

UNIVERSITY OF PENNSYLVANIA

FEDERAL INTRASTATE RAILROAD
RATE REGULATION

HOBART S. PERRY

A THESIS
IN ECONOMICS

PRESENTED TO THE FACULTY OF THE GRADUATE SCHOOL IN
PARTIAL FULFILLMENT OF THE REQUIREMENTS FOR
THE DEGREE OF DOCTOR OF PHILOSOPHY

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PREFACE

The regulation of intrastate railroad rates has been a source of conflict between the Interstate Commerce Commission and the several state commissions. The constitution has given the Federal government supreme and plenary powers over interstate commerce. The states have always had the power to regulate purely intrastate commerce. The question of jurisdiction is the direct result of the growing nationalization of our industries, for state boundary lines are not made with reference to economic needs.

In order that this conflict of regulatory jurisdiction might be settled, many cases have been heard by the United States Supreme Court. The determination of these cases has resulted in many delays. Moreover, the strained relationships between the two types of railroad regulatory commissions has often been contrary to the best interest of the railroads and the public.

The Transportation Act of 1920 gave the Interstate Commerce Commission an increased power over intrastate rates. It is the purpose of this thesis to set forth the legal status of the Federal Commission's authority over this class of rates.

The Transportation Act of 1920 also included a provision by which the Commission was given the legal right to co-operate with the several state commissions. This provision has been invaluable in solving many present difficulties between the two types of railroad regulatory commissions. Chapter seven presents the historical development of this subject. Chapter eight presents the plan incorporating the rules of procedure to be followed in cases of this sort. Many examples of co-operation are included to show the efficacy of this modern method of solving mutual problems.

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I

EARLY INTRASTATE RATE REGULATION

Prior to the enactment of the first important federal railroad regulatory act in 1887—the Act to Regulate Commerce—American railroads were regulated solely by the several states.¹ The states, in most instances at first, created commissions whose duties were of a supervisory-advisory nature. These commissions were concerned with such duties as the collection of statistics, the prevention of accidents and the observance of charter provisions. They had very little actual power for they were to investigate railway practices and to report the facts to the legislature, suggesting what laws should be passed. This brief statement shows that early state regulation was not strict—a situation due undoubtedly to the cordial attitude which prevailed between the public and the carriers and naturally, state legislation reflected this feeling.

This form of state commission regulation continued as long as this cordial relationship existed between the railroads and the public. Unfortunately, this relationship changed about 1870, due largely to many unsocial activities of the early railroad promoters and managers. The consequence of this changed attitude was a series of laws whose primary purpose was the regulation of railroad rates. These laws mark the beginning of strict state railroad regulatory legislation administered by commissions with power to issue orders and to enforce them by legal procedure.

The growing interrelation of interstate commerce and intrastate commerce soon drew the federal government into the field of railroad regulation. The entrance of the national government into this field created two units of government, the federal and state, which were regulating the same railroad system. With

¹ Johnson, Emory R. and Van Metre, Thurman W.—Principles of Railroad Transportation, D. Appleton and Co., 1921. Chapter 25.

the growing nationalization of our industries, the inevitable result was a conflict of authority between the state commissions and the federal railroad administrative agency—the Interstate Commerce Commission.

The powers of this latter agency were enlarged with the increased centralization of authority in the federal government. The state legislatures were usually antagonistic to this tendency with the result that every advance made by the federal authorities was met with increasing resistance by the several state authorities, the chronicling of which gives us a vitally interesting story.

It was realized, however, that there was a limit beyond which the centralization of railroad regulation should not be allowed. Congress, in passing the Transportation Act of 1920, attempted to meet this situation by incorporating the so-called co-operative clause. This provision legally authorized the Interstate Commerce Commission to meet with the several state commissions on a co-operative basis in disputes affecting each other's interests. It was hoped that this provision would round out the legislation necessary to a more effective control over railroad rates and services. The Commission and a Committee representing the state commissions have drawn up a plan containing the rules of procedure to be followed in all co-operative cases. The plan has been tried out in a number of instances, the results of which have proven very successful. Co-operation between the two types of railroad regulatory Commissions has largely eliminated the waste resulting from our system of dual railroad regulation and has substituted a system by which the public is assured, more than ever before, of a more scientific and harmonious regulation of American railroads.

The outstanding American cases which first gave the state legislatures the right to regulate the railroad industries are the so-called Granger cases, of which there are eight. The decision of the Supreme Court in *Munn vs. Illinois*² gives the most important opinion in these cases because it lays down the important principles regarding the regulation of industries of

² *Munn v. Illinois*, 94 U. S. 114.

this sort. The remaining cases applied these principles to the regulation of railroads by the states.

In *Munn vs. Illinois* the court upheld the right of a state legislature to fix by law, the maximum charges for the storage of grain in warehouses. It declared that the State legislature alone was the sole judge of what constituted a reasonable rate and that the matter of equitable rate fixing was a legislative function and not a judicial one. In addition, this power of the state to fix rates on the storage of grain within its borders also applied to the regulation of that traffic which might be moving in interstate commerce. But this power was qualified in two ways: first, that the regulation of this sort of traffic must be incidental to the regulation of intrastate traffic and, second, that a State was permitted to regulate this sort of interstate commerce only until Congress acted.

These general principles were applied to the regulation of railroad rates in *Peik vs. Chicago and Northwestern Railroad Company*³ and the other Granger cases, thus giving the state the power to regulate all railroad traffic within its borders although some of this traffic might be moving in interstate commerce.

Ten years after the decision of the Granger cases, the Supreme Court decided the so-called *Wabash case*,⁴ modifying the principles laid down in 1877. This modification was of extreme importance to the subject of railroad rate regulation in that it limited the application of the principle enunciated in the Granger cases, thus bringing the Federal Government into the problem. The case arose from a state statute which forbade a railroad company from charging or receiving for the transportation of passengers or freight of the same class within the state, the same or a greater sum for any distance than it did for a longer distance in the same direction. This statute obviously, was aimed at unreasonable place discrimination—a railroad problem of great importance to the public at that time. The *Wabash Railroad* was accused of having violated this statute in the case of shipments from points within Illinois to the city of New York.

³ *Peik v. Chicago and Northwestern Railway Company, et al.*, 94 U. S. 164.

⁴ *Wabash, St. Louis and Pacific Railway Company v. Illinois*, 118 U. S. 557.

The Supreme Court reversed the decision of the Supreme Court of Illinois since it amounted to a regulation of interstate commerce. It was quite definite in declaring that a state did have the right to control purely intrastate commerce. In fact the Court applied a territorial significance to this subject, declaring that the State of Illinois did have the right to regulate transportation rates and services from one boundary point to another. For example, the state had the right to regulate all contracts from Cairo to Chicago and from Chicago to Alton, all boundary points constituting important centers of commerce—since “both the charge and the actual transportation . . . are exclusively confined to the limits of the territory of the State, and is not commerce among the States.” The Court then reviewed certain decisions which held state laws to be ineffective when they placed a direct burden upon interstate commerce, emphasizing the distinction with respect to the operation of the statute upon domestic transactions, saying, “Of the justice or propriety of the principle which lies at the foundation of the Illinois statute, it is not the province of this court to speak. As restricted to a transportation which begins and ends within the limits of the state, it may be just and equitable and it certainly is within the province of the state legislature to determine that question.”

This decision had a very important bearing upon future railroad legislation. It took away from the States the power to fix rates on interstate railroad traffic and thus permitted the larger share of the total railroad transportation service to be left unregulated. Such a condition could not long exist, and as a result, Congress promptly enacted legislation dealing with interstate commerce—the first important piece of railroad regulation ever attempted by the federal government.

II

THE ACT OF 1887, AND THE MINNESOTA RATE CASE

The Interstate Commerce Act of 1887 was an act to regulate the commerce of the United States. It was applied to interstate and foreign commerce carried by railroad, or, in cases of continuous shipment, to traffic by railroad and water. In fact, the country was still of the belief that the states should be allowed an almost complete sovereignty in intrastate rate affairs, while the central government was to confine itself to those rate matters that were strictly of an interstate nature.

Until 1914 the important provision in the Act to Regulate Commerce, as amended from time to time, relating to this topic was Section one, paragraph 2-a. This section states that the provisions of the Act shall apply to all transportation which occurs within the United States, but that it "shall not apply to the transportation of passengers or property, or to the receiving, delivering, storage or handling of property, wholly within one state and not shipped to or from a foreign country from or to any place in the United States as aforesaid." This definite statement, coupled with the opinions of the Supreme Court in the *Wabash* case, *Dow vs. Beidelman*,¹ *Reagan vs. Farmers Loan and Trust Company*² and many others, all of which emphasized the rights of the states to regulate intrastate rates and tariffs seemed to make certain that this power of the states was unassailable. In addition, the Interstate Commerce Commission had so little power over rates, even though they were of an interstate nature, that no one came forward to check the state's power with an argument that was sufficiently reasonable. As a result, it was not until the *Minnesota Rate Case*³ that the Supreme Court reviewed this provision of the Act of 1887. The opinion of the Court was written in such a careful manner, that it is important that a minute analysis of this opinion be set forth.

¹ *Dow vs. Beidleman*, 125 U. S. 680.

² *Reagan v. Farmers' Loan and Trust Company*, 154 U. S. 362.

³ *Simpson v. Sheppard, et al* (*The Minnesota Rate Case*), 230 U. S. 352.

The Minnesota Rate case was the result of a suit brought by the stockholders of the Northern Pacific Railway Company, and two other railroads for the purpose of restraining the Railroad Commission of Minnesota from putting into effect certain orders of that agency prescribing maximum charges for the intrastate transportation of freight and passengers. The complainants claimed that these orders were invalid because they interfered with interstate commerce in an unconstitutional manner; that the rates were confiscatory, and lastly that the penalties imposed for the violation of the orders were so severe as to result in a denial of the equal protection of the laws and a deprivation of property without due process of law. Justice Hughes wrote the opinion of the Court. He showed that before the issuance of the State Commission's order, the railroad companies had maintained rates which were relatively fair and not discriminatory between interstate and intrastate commerce. This was necessarily so because the territory of Wisconsin, Minnesota, North Dakota and South Dakota was an economic unit and state lines were not drawn with reference to any subdivisions of this particular economic unit. He pointed out that Superior, Wisconsin, and Duluth, Minnesota, situated side by side at the extreme end of Lake Superior, were only two of several pairs of cities, each one located in a different state, and both of which competed for the same business in Minnesota. Naturally, the interstate rates and the intrastate rates had to be kept on a parity with each other, if both cities were to be able to meet the competition of the other.

The court brought out the fact that the new schedules fixed for the intrastate transportation did disturb the equilibrium existing between the interstate rates and intrastate rates, especially near the boundary lines. This was conceded by the state commissioners. But the state commissioners of eight states who filed a brief as *amici curiae* stated that if the court did not uphold their contention, the regulation by the states of rates for intrastate transportation would be practically destroyed. They based this statement on the reasoning that there was only a very little traffic between two towns within a state that did not come into competition with some interstate haul and that

"if the disturbance of the existing relation between competitive state and interstate rates is the correct criterion, no reduction can be made in state rates without interfering with interstate rates."

The Supreme Court discussed the effect of the Railroad Commission's orders from two angles. First that the action of the State imposed a direct burden upon interstate commerce; second that it was in conflict with the Act to Regulate Commerce. The first topic, the Court held, was very important. It declared that the states had always had the power to fix intrastate transportation rates. This power had been exercised by almost every state in the union. "Was this power, apart from Federal action, subject to the limitation that the state could not fix intrastate rates, reasonable as such, generally throughout the State, but only as to such places and in such circumstances that the interstate business of the carriers would not thereby be affected?" If this were true, a state was not allowed to fix a schedule of rates on intrastate traffic which would cause the railroads to readjust the rates that had existed previously to competing points, located without the state. On the other hand, if it were not true, the Court declared that it was necessary to determine whether Congress had acted so as to restrict the states from bringing about such a condition.

In answering this question, the Court stated that the states were not allowed either directly or indirectly to place unjust burdens upon interstate commerce. Commerce of an interstate nature should be governed by Congress within its constitutional limits. It emphasized the fact that the regulation of interstate commerce by Congress is "supreme and plenary" and that this power could not be limited except by the Constitution of the United States. This policy was considered essential to the national, political, social, and economic unity.

However, "within these limitations the states do have a wide range for the permissible exercise of power appropriate to their territorial jurisdictions although interstate commerce may be affected." But this is true only when Congress has not yet acted. The court brought out the fact that our system of regulation is one which demands the co-operation of local governments

with that of the Federal government. In this way there is no loss of "local efficiency" and our system of government becomes more flexible. It is thus clear that even though the authority of a state is limited to those affairs of purely domestic concern still the *indirect regulation* of interstate commerce is possible. However, the action of the state in this respect is always subject to the will of Congress. In the event that this latter body does decide to enter the field of regulation that the states have already entered, and in the event Congress is acting within its constitutional authority, then it is for the states to retire from that field of regulation.

Congress had passed the Act to regulate the commerce of the United States in 1887. Had Congress really acted with respect to intrastate rates? This was the second question discussed by the Court. It reviewed many cases bearing on this discussion and then concluded that "the doctrine was thus fully established that the state could not prescribe interstate rates, but could fix reasonable intrastate rates throughout its territory. As a power appropriate to the territorial jurisdiction of the state, it is not confined to a part of the State, but extends throughout the state—to its cities adjacent to its boundaries as well as to those in the interior of the State. To say that this power exists, but that it may be exercised only in prescribing rates that are on equal or higher basis than those that are fixed by the carrier for interstate transportation is to maintain the power in name while denying it in fact." This authority of the States could be restricted, the court continued, but only "by virtue of the paramount power of Congress over interstate commerce and its instruments." This action of Congress must be definitely stated in order that it would be clear to all that it was its intention to take this power away from the states.

Had Congress intended to prevent the states from the regulation of rates throughout its territory, a power it had always enjoyed? The Court answered negatively. It based this opinion upon the terms of the Federal statute, the continued exercise of state authority and the decisions of the Supreme Court which recognized and upheld this authority. In discussing the terms of the Act of 1887, it reviewed Section one,

paragraph 2-a, in which Congress disclaimed any intention of regulating commerce "wholly within one state." It then pointed out that paragraph 2-b, relating to the Interstate Commerce Commission's control over telephones and telegraphs, again disclaimed the desire of Congress to control "the transmission of intelligence by wire . . . wholly within one state . . ." This paragraph, it was pointed out, was passed several years after section one, paragraph 2-a, and that this fact in itself was sufficient to show that the intent of Congress was to regulate that commerce which was purely interstate.

Another provision of the Act of 1887 relating to this topic was Section three, paragraph one. This provision forbade undue or unreasonable preference or advantage to localities. To be more definite, it stated "that it shall be unlawful for any common carrier subject to the provisions of this Act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, firm, corporation or locality, or any particular description of traffic to any undue or unreasonable, prejudice or disadvantage in any respect whatsoever." In case this provision has been violated, the Interstate Commerce Commission is authorized to bring about its removal. But this removal order may be issued only after a careful investigation has been conducted by this Federal Agency, and this investigation has proved beyond doubt that such an unreasonable advantage, preference or prejudice between persons or localities exists.

The Minnesota Rate Case is important to our problem in that the Court declared it could not rule on a question of fact until it had been considered first by the Interstate Commerce Commission and the latter agency had issued its decision. The Court declared that the statute endeavored to secure uniformity by means of "prescribed standards through the examination and appreciation of complex facts of transportation by a body created for this purpose; and, as this court has repeatedly held, it would be destructive of the system of regulation defined by the statute, if the court without preliminary action by the Commission, were to undertake to pass upon the administra-

tive questions which the statute has primarily confided to it." The question at issue was whether or not the State of Minnesota had created an unjust situation by giving preference to the localities located within its borders over competitive points located in other states. No finding of unjust discrimination had been found by the Federal Commission, nor had it made any report.

This opinion is in accord with previous decisions of the Supreme Court.⁴ The Courts are to decide questions of law only. The Interstate Commerce Commission is to decide questions of fact. Had the Supreme Court ruled that the State of Minnesota had created a situation that was injurious to interstate commerce, it would have been deciding a question of fact. An action of this sort would have weakened the authority of the Interstate Commerce Commission and would not have been in the best interests of the public.

This case was not a blow to Federal authority. From a fundamental point of view, it was a victory, for it asserted definitely that Congress did have supreme control in the matter of Interstate Commerce and that the states had no right to pass regulations tending to conflict with this right. The Court went so far as to suggest that Congress had only to pass legislation to this effect whenever it believed that adequate regulation of interstate commerce under existing statutes was no longer possible.

⁴ Interstate Commerce Commission Appt. v. Illinois Central Railroad company, 215 U. S. 452.

III

PERIOD 1914-1920

THE BEGINNING OF FEDERAL REGULATION OF INTRASTATE RATES

During the period 1914-1920, three decisions of the United States Supreme Court of outstanding importance regarding the regulation of intrastate railroad rates were rendered. These decisions are important not only because they determined the constitutionality of the authority which the Interstate Commerce Commission was desirous of assuming in this particular phase of its work, but also for the reason that the cases exerted an influence of much greater importance in that they determined definitely the constitutional power of the Federal Government. As these cases were favorable to the authority already assumed by Congress in the regulation of intrastate affairs, it is but natural to believe that they exerted a powerful influence over future legislation. This legislation has been of a constructive nature and has made the system of railroads in the United States a national one.

The first of these cases is popularly called the Shreveport case. It resulted from a controversy between the Interstate Commerce Commission and the Railroad Commission of Texas.¹ A complaint had been made to the Commission by the Railroad Commission of Louisiana to the effect that the Texas commission required the railroads under its jurisdiction to maintain a scale of rates which discriminated against shipments into Texas from the surrounding states. It was maintained that the purpose of the Texas Commission was to build up the State's manufacturing and jobbing centers at the expense of those manufacturing and jobbing centers established in neighboring states. To be more definite, Shreveport, Louisiana, is about 40

¹ *Houston, East and West Texas Railway Company vs. United States*, 234 U. S. 342.

miles from the Texas border line and 231 miles from Houston, Texas, on the line of the Houston, East and West Texas and Houston and Shreveport Railroad Companies. It is 189 miles from Dallas, Texas, on the line of the Texas and Pacific Railroad Company. Shreveport, Louisiana, competes with both Texas cities—Dallas and Houston—for the trade of the intervening territory. The rates established by the Texas commission on both of these railroad lines from Houston and Dallas, Texas, to the east to the intermediate points in Texas, were much less, according to distance, than from Shreveport westward to the same points. These differences were so great that the intention of the Texas commission to aid Texas shippers was realized. The Interstate Commerce Commission gave as an example of this condition the rate on wagons from Dallas to Marshall, Texas—a distance of 147.7 miles. This rate was 36.8 cents per hundred pounds. However, the rate from Shreveport, Louisiana to Marshall, Texas, a distance of 42 miles, was 56 cents. This discrimination was only one of many, and it serves to bring out the justice of the Interstate Commerce Commission's ruling in the matter when it ordered the carriers to "justly equalize the terms and conditions upon which they will extend transportation to traffic of a similar character, moving into Texas from Shreveport, with that moving wholly within the state of Texas."

When the case was brought to the Supreme Court, the defendants had consolidated their defense into two main arguments. The first argument maintained that Congress had no control over the intrastate charges of an interstate carrier even though such control was exercised because it was believed essential to protect the traffic of an interstate nature from injurious and harmful discrimination. The Supreme Court, however, pointed out that the writers of the Federal Constitution had foreseen serious rivalries between State governments and that they had placed in Congress complete control over interstate traffic. This control was particularly necessary whenever the quarrels and ambitions of the state governments threatened to injure this type of traffic. These men had witnessed the downfall of the Confederation which resulted directly from state antagonism,

and therefore in order to make national unity more certain, they had included the provision in the constitution which provided for "uniform legislation." Since Congress has been given complete authority over the regulation of interstate commerce it has the power to enact "all appropriate legislation for its protection and advancement," and to adopt "all measures to promote its growth and insure its safety" and to "foster, protect, control and restrain" whenever it is considered necessary to the complete development of interstate commerce.

The court continued by declaring that Congress had authority over "interstate carriers as instruments of interstate commerce" and therefore this authority "necessarily embraces the right to control their operations in all matters having such a *close and substantial relation to interstate traffic* that the *control is essential or appropriate* to the security of that traffic, to the efficiency of the interstate service and to the maintenance of conditions under which interstate commerce may be conducted upon fair terms and without molestation or hindrance. As it is competent for Congress to legislate to these ends, unquestionably it may seek their attainment by requiring that the agencies of interstate commerce shall not be used in such manner as to cripple, retard, or destroy it. The fact that carriers are instruments of intrastate commerce as well as of interstate commerce, does not derogate from the complete and paramount authority of Congress over the latter, or preclude the Federal power from being exerted to prevent the intrastate operations of such carriers from being made a means of injury to that which has been confided to Federal carriers. Wherever the *interstate and intrastate transactions of carriers are so related that the government of one involves the control of the other, it is Congress, and not the state, that is entitled to prescribe the final and dominant rule*, for otherwise Congress would be denied the exercise of its constitutional authority, and the state, and not the nation, would be supreme within the national field."

The italics (which are the author's) point out the outstanding legal doctrine of the quotation. It establishes for the first time, in the field of railroad rates, that, whenever interstate commerce is being subjected to unjust and harmful

practices at the hands of state legislatures or of their agencies, that Congress or any of its legally constituted subordinate agencies may intervene in order to prevent such practices. This doctrine was to hold whether the same agency was being used for both interstate and intrastate commerce or different agencies were being used for the two kinds of traffic. It was for the states to follow the standards set by the Federal Government, not for the Federal Government to follow the standards of the state governments because the former was supreme in its authority over interstate commerce. Were the state to establish a scale of rates which differed from the scale that the Federal government had established, such an action would limit the supreme authority of the central government. This was true even though the rates determined by the Interstate Commerce Commission bore an incorrect relationship to the intrastate scale of rates and though the former were wrong. It was for the states to complain to the Commission and for the latter to make the necessary correction.

However, the Supreme Court declared emphatically that Congress did not have the authority to regulate the internal commerce of a state. In order to bring about a change in its schedule of rates, it had to show that the difference prevailing between the Federal government's rates and the intrastate rates had brought about an unfavorable change in the volume or the movement of the interstate traffic and that this was unjustly discriminatory as regards interstate traffic. A person or a locality outside of a particular state must have suffered.

The second argument of the defendants assumed that Congress had the power to control intrastate charges of an interstate carrier when unjust discrimination against interstate commerce existed. They maintained, however, that Congress had not yet exercised this power and therefore the Commission had exceeded its authority. The whole controversy thus centers about section three, of the Act to Regulate Commerce which has already been discussed. This section, in brief, confers upon the Commission the power to declare unlawful any undue or unreasonable preference given to persons, places, or classes of commodities. The defendants declared that this section was of no consequence

in this case because of Section one, paragraph 2-a, which reserved to the states the regulation of purely internal affairs.

The Court did not hold this view to be correct. It declared that the fundamental problem at the time this measure was passed dealt with discriminations of all sorts. It went back into legislative history to prove that Congress really intended to rectify this evil and that the resulting legislation was of such a sweeping nature as to include all sorts of discriminations against interstate commerce regardless of state boundaries. The Court contrasted the Minnesota Rate Case with the present case and showed that no discrimination was proved in the former case by the Interstate Commerce Commission. It repeated the statement it had made in that case that in the event discrimination was found to exist, the Courts had no right to interfere, since the Interstate Commerce Commission had within its powers complete jurisdiction over the determination of all questions of fact. It dismissed the argument of the Texas Commission based upon Section one, paragraph 2-a by saying that the words "wholly within one state" did not prevent the Interstate Commerce Commission from acting when their action was for the purpose of preventing injury to interstate commerce.

In contrasting these two decisions, it seems reasonable to assume that the Court would have awarded the decision to the complainants in the Minnesota case had they taken their complaint to the Interstate Commerce Commission. Discrimination existed in both cases. Everybody concerned with the Minnesota case admitted that the intrastate schedule of rates necessitated the readjustment of the interstate tariffs. Such a fact presumes unjust discrimination. But the Supreme Court could not declare that discrimination existed because it had adopted the policy of deciding questions of law only. The determination as to whether or not unjust discrimination exists is a question for an administrative body to decide. Congress had created the Federal Commission for this purpose. This regulatory agency had not investigated the Minnesota Case, but it had investigated the Shreveport case, and had found unjust discrimination and had ordered the carriers to correct this situation. This order, the Court held, was legal because of the supremacy of Congress over inter-

state commerce. The control of this sort of commerce necessitated the control of intrastate railroad rates when interstate commerce and intrastate commerce are so closely interwoven that it is impossible to regulate the one without regulating the other.

Two similar cases were decided by the Supreme Court a short time after the Shreveport case. These cases are important in that they more clearly defined the power of the Interstate Commerce Commission over intrastate rate regulation. The American Express Company case was decided in 1916.² The order of the Commission ordering the carriers to correct the unjust discrimination *was expressed in general terms*, "prohibiting the charging of higher rates for the transportation of shipments by express between Sioux City, Iowa, and points in the state of South Dakota than are contemporaneously . . . demanded . . . for transportation under substantially similar circumstances and conditions for substantially equal distances between Sioux Falls, Mitchell, Aberdeen, Watertown and Yankston, South Dakota, on the one hand, and said points in the state of South Dakota, on the other, which said relation of rates has been found by the Commission to be unjustly discriminatory." The Commission included in the order, as usual, the report containing findings of facts and conclusions. This report made it definite that the order was to apply only to competitive territory and it stated definitely this competitive territory to be the southeastern section of South Dakota. It also contained a statement to the effect that the scale of rates established by the South Dakota Commission was too low to be made "the measure of interstate rates between Sioux City and South Dakota points"; that the interstate rate schedule recently adopted by the Interstate Commerce Commission had not been shown to be unreasonable; that no reason had been presented for modifying them and the Interstate Commerce Commission was "under no doubt as to how the unjust discrimination found to exist should be corrected." However, it should be emphasized that the Commission made no statement as to the way this unjust discrimination was to be remedied; nor did

² American Express Company vs. Caldwell, 244 U. S., 617.

it name the competitive points within South Dakota to which the rate adjustment should apply.

The railroads operating in South Dakota immediately complied with the order of the Commission, leaving nearly all the express rates in South Dakota in accord with the schedule of rates adopted by the South Dakota commission in 1911. The carriers stated expressly that the only rates that had been disturbed were those which the Interstate Commerce Commission had declared to be unjustly discriminatory against interstate commerce. The latter class of rates had been declared reasonable and therefore this implied authority gave the express companies the right to maintain the interstate rate level and to raise the discriminatory intrastate rates to the level of the former.

In this connection the United States Supreme Court was careful to state that it is the relation which the intrastate rates bear to the interstate rates that makes for unjustdiscrimination. Two different schedules of rates may be maintained, one in the intrastate business and the other in interstate commerce and yet both may be in the interest of railroad companies, of shippers, and of the general public.

This case differs from the Shreveport case in that it was maintained that the order of the Interstate Commerce Commission was invalid because it had issued an order which lacked definiteness. This lack of definiteness applied to the manner in which the correction should take place and to the territory to which it should apply. The state officials maintained that even if this latter fact did not make the order entirely void, the order could not serve as a justification for failing to observe the regulations of the state regarding the printing and publication of changes in rates and other similar matters.

This objection was considered by the United States Supreme Court to be invalid. It declared that the Federal Commission's power was supreme in intrastate rate regulation only when this authority was incidental and necessary to the regulation of interstate commerce. As a result, it is necessary for the order of the Interstate Commerce Commission to be stated definitely and applicable only to such points or sections of the country as may be proven to be affected by the unjust or unwise state

decision affecting interstate commerce adversely, for the authority of the state as regards its purely internal affairs is supreme and no power is granted to the Interstate Commerce Commission to take it away.

This statement illustrates the necessity for definiteness on the part of the Commission in issuing an order when a conflict exists between Federal and State authority. It need not specify the exact rates to be charged, nor is it necessary for the Federal Commission to direct specifically how the change shall be made for the Supreme Court held that this agency could issue an order which "left to the carrier's discretion to determine how the discrimination should be removed; that is whether by lowering the interstate rates or by raising the intrastate rates, or by doing both." The main reason that caused the court to declare the Interstate Commerce Commission's order valid was the fact that the original report, as was customary, was included in the final order. This report made it clear that the order was to apply only to those points within the "competitive territory" or "to these points commercially tributary both to the five cities and to Sioux City." The Court emphasized the phrase used in the final order which qualified the general terms used "which said relation of rates has been found by the Commission to be unjustly discriminatory."

That the railroad companies had not complied with the statutes of the State of South Dakota regarding advances in rates did not change the attitude of the court. It reasoned that a state statute is only applicable to intrastate railroad rate regulation when the state has complete authority over the conditions of regulation. But the court held that the State's statutes "cannot be held to apply to changes in intrastate rates over which the Board has no control." and that "a valid order of the Commission is, when applicable, a legal justification for disregarding a conflicting regulation of the state law—because the Federal authority is dominant." The railroad companies, however, were to give proper notice to the States of any changes that might be made. This notice does not need to conform to statutory regulations, nor to any order issued by a subordinate agency of a state. It must be a reasonable notice,

however, and the reasonableness of the notice is to be determined by ordinary business practices.

The next case is popularly called the Illinois Passenger Fares case.³ The facts of the case are similar to the two preceding cases described above in that the complaint alleged that the intrastate rates established by the State regulatory commission discriminated unjustly against interstate commerce. This case was decided in favor of the State Public Utilities Commission because of the indefiniteness of the order. The railroads had interpreted the Commission's order as giving them permission to raise the intrastate railroad rate structure since they believed the discrimination to be state-wide. The State authorities denied this interpretation and in addition declared the order to be invalid in that "the extent to which it is intended to affect the state-made rates is so indefinitely and vaguely stated as to make it inoperative and of no effect." The only discrimination mentioned in both the report and order referred to that passenger commerce between Illinois and two cities outside that state. The report did not declare in specific terms the points in Illinois to which the discrimination was present. The Court agreed with the State authorities but stated that the Commission's power over intrastate rates was sufficiently broad to remove every discrimination existing against interstate commerce. Had the Commission found the discrimination in this case to be state-wide it would have said so.

The victory of the Interstate Commerce Commission in each of these three cases was the result of the Court's interpretation of Section three. This section was held to be an all-embracing prohibition of unjust discrimination against interstate localities caused by an order of a State legislature or one of its legally constituted administration agencies.⁴ Each of these three cases are important in that they expressly define the powers of the states and of the Federal Government. The

³ *Illinois Central Railroad Company vs. State Public Utilities Commission of Illinois, et. al.*, 245 U. S., 493.

⁴ *Modification of Transportation Act of 1920. Hearings before the Committee on Interstate Commerce, United States Senate, 1922, Statement of Mr. Walker D. Hines, Page 575.*

Shreveport case limited the states in the exercise of their powers over railroad rates. The American Express Company case required the Interstate Commerce Commission to issue orders which were sufficiently definite so that no possible question might be raised as to the territory in which the discrimination existed. The Illinois Passenger Fares Case carried this principle into effect, thus limiting the powers of the Federal Commission and the railroad carriers which put the order of this administration agency into effect. These court decisions show, positively or affirmatively, that the Interstate Commerce Commission had large powers over intrastate rates, but also show negatively that the Interstate Commerce Commission had the authority to unify completely the rates of the country and that the authority of the States was still important in the field of railroad rate regulation.

IV

THE ACT OF 1920 AND EX PARTE 74

Among the provisions of the Transportation Act of 1920, were included two relating to the regulation of rates, both of which have a very direct bearing upon the question of intrastate rate regulation. Section thirteen, paragraphs 3 and 4, authorizes the Interstate Commerce Commission to deal directly with intrastate rates, fares, charges, and other similar matters, in those cases where these charges are unduly discriminatory against interstate commerce. Both paragraphs have been the basis for much discussion by almost every one interested in the subject of transportation. The former paragraph has received a good deal of favorable comment as a rule, while paragraph four has aroused the antagonism of those who wished to protect the State's sovereignty in these matters.

This latter provision requires the Federal Commission to make a thorough investigation of every question of this nature, either upon complaint or upon its own initiative. By giving the Commission the right to conduct investigations without a specific complaint, this provision gives this agency a more positive authority in the regulation of intrastate rates. In addition the Commission was authorized to prescribe the rate, fare, charge or the maximum or minimum to be charged if the inquiry established definitely that the charges established by or under State authority caused an unjust discrimination in favor of persons or localities engaged in intrastate commerce as against persons or localities engaged in interstate commerce, or that such state regulation granted to these persons or localities an undue preference or advantage over persons or localities engaged in interstate commerce. The order issued by the Interstate Commerce Commission was to be such as completely to remedy the situation, the provision stating that "such rates, fares, charges, classification, regulations, and practices, shall be observed while in effect by the carriers parties to such pro-

ceedings affected thereby, the law of any State or the decision or order of any State authority to the contrary notwithstanding."

The Interstate Commerce Commission and many persons of importance¹ have claimed that this paragraph gave the Federal Commission an enlarged power over the regulation of intrastate rates, charges, etc., when these charges conflicted with interstate commerce so as to be unduly discriminatory. As a matter of fact this section by itself did not change, in a material sense, the meaning of the term discrimination obtained from Section three of the old act as interpreted by the Supreme Court in the Shreveport case. This latter section is one which forbids unjust discriminations of all sorts. Section thirteen, paragraph 4, simply refers to a particular type of unjust discrimination. When these two provisions are contrasted in this way, it becomes evident that the newer provision in no material way increases the jurisdiction of the Interstate Commerce Commission. The only words referring to unjust discrimination in this latter paragraph relate to unjust discrimination against interstate commerce. Under the act as it existed prior to 1920, the law held that there was to be no discrimination against persons, places, or descriptions of traffic. The Shreveport case interpreted this provision as including intrastate rates when they brought about an undue and unjust discrimination against interstate commerce. This reasoning shows that no new fundamental legislation was created with the passage of this section in so far as it relates to the authority of the Interstate Commerce Commission in doing away with this sort of discrimination.

It is not to be understood by this statement that Congress had passed a redundant piece of legislation. This section has much that is valuable. Congress certainly clarified its intention in the matter of intrastate rate regulation. It was no longer necessary for the Supreme Court to interpret Section three as being an all-embracing prohibition against this sort of discrimination. This section gave the Interstate Commerce Commission the right to deal directly with an unjust discrimination

¹ See Chapter V.

² Hearings before Senate Committee—Modification of Transportation Act of 1920. Page 683.

against interstate commerce created by intrastate commerce regulation by or under State authority. In short, this section has made expressly possible that which was before implied by Section three as interpreted by the Supreme Court in the Shreveport, American Express and Illinois Passenger Fare cases outlined in the previous chapter.

An illustration of just how Section thirteen, paragraph four, has worked in an actual case will serve to explain the above statements. In the New York case (1922) the Federal Commission instituted an investigation in charge of a commissioner. A chief examiner was assigned to conduct the hearing. From the evidence given at the hearing, it was established that the interstate fares were just and reasonable. It was ascertained that the intrastate fares were much lower,—so much so in fact as to result in an unjust discrimination of the sort found in the Shreveport case. It was furthermore, definitely established that the conditions surrounding the transportation service were substantially similar. So far, the Commission acted in this case as it had done in the Shreveport case. But the method of removing the discrimination in the New York case was not similar to that employed in the Shreveport case.

Without Section thirteen, paragraph four, the intrastate rate could not have been directly prescribed. The interstate rate would have been declared just and reasonable and since the Federal Commission had no control over State regulatory agencies, the order would have directed the railroads to remove the discrimination against interstate commerce. Since the Interstate Commerce Commission had declared the maximum interstate rates to be just and reasonable, the carrier, in removing the discrimination was not called upon to put in any rates that were lower than those found just and reasonable. Therefore it brought the intrastate rates up to the level of the interstate rates.

The Federal Commission proceeded in the same manner in all the cases arising out of Ex Parte 74.³ It dealt with the railroads directly, charging that they had violated the Act of 1920 for one

³ Ex Parte 74, 58 I. C. C., 220.

reason or another. These decisions were no different from those issued in the Shreveport case and others decided prior to the Act. However, the only difference in the final orders is to be found in the method by which the unjust discrimination is removed. Section thirteen, paragraph four, gave the Commission the right to order the carriers to establish the exact intrastate rate or schedule of rates and other matters of a similar nature so that it might completely remove those that had been prescribed by State commissions or State statutes and which affected interstate commerce injuriously. Moreover it allowed the Commission to take steps to accomplish this result on its own initiative, thereby giving it a more positive and constructive control over both intrastate and interstate rates. In this connection, it should be brought out that Congress has never given the Interstate Commerce Commission the power to require State Commissions to do anything. This agency deals only with carriers.

Paragraph three of Section thirteen has also proved to be a very wise provision. Congress, in incorporating this paragraph in the Act of 1920, did not wish to exclude from our system of railroad regulation the beneficial aid of local authority. It has already been brought out in the discussion of the Minnesota Rate Case, that those who first established our system of government recognized that the best method of solving our social and economic problems is by the mutual co-operation of both the local authorities and the central authority. In this section, paragraph three, Congress states that the Commission "may confer with the authorities of any state having regulatory jurisdiction over the class of persons and corporations subject to this act with respect to the jurisdiction of such state bodies and of the Commission, and to that end is authorized and empowered under rules to be prescribed by it, and which may be modified from time to time, to hold joint hearings with any such State regulating bodies on any matters wherein the Commission is empowered to act, and where the rate-making authority of a state is or may be affected by the action of the Commission." In addition to this aid which the Commission may request of the States, it is authorized "to avail itself of the

co-operation, services, records, and facilities of such State authorities in the enforcement of any provisions of the Act."

This paragraph enables State regulatory agencies to exert an influence upon the regulation of intrastate rates. It provides the legal right to set up a system from which the Federal Commission may obtain aid from State officials, who know local situations and problems much better than the members and employees of the Federal Commission. Very little was done about this provision for the first two years. The State regulatory officials, realizing that their lawful influence in important rate cases had been seriously limited, were anxious that something be done about this provision. It was maintained that the word "may" was not placed in the provision by Congress so as to give the Federal Commission the right to use its discretion in deciding when co-operation was to be employed.⁴ These State officials argued that the word was necessarily used, because co-operation depended not only upon the attitude of the Interstate Commerce Commission but also upon the desire of the State authorities to avail themselves of the opportunity to co-operate; that Congress had not inserted the "shall" because of the possibility that the State authorities would not care to co-operate, and that Congress had included this provision for the benefit of the general public and not for the purpose of increasing the authority of the Federal Commission over State regulatory bodies.

These facts were presented to the Supreme Court in the Wisconsin case.⁵ The State authorities claimed in addition that since the Commission had not considered this provision mandatory even though ample state administrative machinery was available, the order was premature and therefore invalid. The Supreme Court did not agree with them on any of these assertions. It considered the word "may" as being of a permissive nature and not mandatory in any way. It declared that, "when state commissions (in practice) shall recognize their obligation to maintain a proportionate and equitable share of the income

⁴ Hearings before Senate Committee—Modification of Transportation Act of 1920. Pages 13–23.

⁵ Railroad Commission of Wisconsin v. Chicago, Burlington and Quincy Railroad Company, 257 U. S., 563.

of the carriers from intrastate rates, conferences between the Interstate Commerce Commission and the State commissions may dispense with the necessity for any rigid Federal order as to these rates, and leave to the State commissions the power to deal with them and increase them at their discretion." This decision permitted the Commission to exercise its judgment as to the extent to which it shall avail itself of State aid by means of conferences and joint hearings and matters of a similar nature. The making of all the rules and regulations determining the basis upon which both parties are to co-operate also are entrusted for final determination to the Federal Commission. This is a wise provision, for it would be practically impossible to persuade forty-eight different State regulatory commissions to any plan of co-operation without the existence of some superior central agency whose authority was known by all these independent agencies.

Both of these paragraphs deal only with unreasonable or unjust discriminatory rates against persons or places, wholly within the State, in so far as these intrastate rates as determined by state legislation or by orders of State regulatory commissions affect interstate commerce injuriously. Although Section thirteen grants the Federal Commission a more positive control over rates under these conditions, such a power was not considered sufficient for the effective regulation of American common carriers. The Commission could act only after an injustice had been committed. The railroad companies' revenues were protected only to the extent that the constitution requires State commissions to fix rates which shall furnish an adequate compensation for the particular service rendered. The railroads concerned with State regulation were not only those engaged solely in intrastate transportation but also those in interstate commerce. In this country very few railroads exist whose business is not of an interstate character. Moreover, much intrastate traffic is carried over railroads that are primarily interested in interstate commerce. This shows that an intimate relationship exists between intrastate and interstate transportation and that the amount of revenues contributed by

each kind of traffic to the gross income of the railroad companies is peculiarly inter-related.

The types of State legislation and orders issued by the State regulatory agencies were frequently of such a sort as to cause the railroads reduced revenues from their intrastate operations. This injected such an element of uncertainty into their business as to create a situation considered by many persons as highly undesirable. They believed that the Commission should have the power to act before an injustice was created. In this way, the future of American railroads could be made more certain and the public could be more certain of a modern and efficient railroad machine and one better able to keep up with the economic progress of the nation.

It was believed, moreover, that both types of regulatory commissions should be made responsible, by Congressional action, for the results of their rate-making activities.⁶ Inadequate rates demoralize railroad efficiency. A statutory rule of rate-making would tend to establish a measure by which both sorts of commissions could better determine the revenue needs of the carriers. It would be a fundamental assurance for the successful operation of railroads in the future under private ownership and subject to government regulation—a system considered highly desirable by the people of the United States.

The provisions of Section 15-A incorporated these ideas. It gave the Federal Commission certain affirmative powers so that it could the more effectively exercise a unified control over all rates. It is the heart of the Transportation Act of 1920.⁷ The most important feature of the Section requires that "in the exercise of its power to prescribe just and reasonable rates, the Commission shall initiate, modify, establish or adjust such rates so that the carriers as a whole (or in each of such rate groups or territories as the Commission may from time to time designate) will, under honest, efficient and economical management and reasonable expenditures for maintenance of way, structures,

⁶ Extension of Tenure of Government control of Railroads—Hearings before Senate Committee on Interstate Commerce. Page 792.

⁷ Dayton-Goose Creek Railway Company v. United States, Interstate Commerce Commission *et al.*, 263 U. S. 451.

and equipment, earn an aggregate annual net railway operating income equal, as nearly as may be, to a fair return upon the aggregate value of the railway property of such carriers held for and used in the service of transportation."

In addition to the above provision, the Commission was authorized to determine "what percentage of the aggregate property value constitutes a fair return thereon and such percentage shall be uniform for all rate groups or territories which may be designated by the Commission." This figure may be changed at any time the Commission believes it necessary.

Congress also was explicit in declaring that it was passing this legislation in the hope that it would build up an efficient railroad machine. It included the provision that the Commission was to consider in the revision of the just statutory rate of return, the possibility of attracting additional capital into the railroad industry, in addition to the fact that the rate of return should be of such a nature as to compensate adequately the capital already invested in the railroads. The management of the existing transportation facilities, however, must be "honest, efficient and economical."

Congress, in passing this section, desired to provide sufficient revenues for the railroads. It realized that this was possible only when the Federal Commission was given the authority to initiate rates. It is only when the central regulatory agency has this power that one may consider its authority flexible, positive and affirmative. However, the most important feature of the whole section is incorporated in the provision defining definitely the general proposition that all rates, charges and other matters of a similar nature shall be "reasonable" and "fair" and that they should "provide sufficient revenue." These phrases have always been discussed before regulatory commissions. They have never been protested. The trouble with these phrases lies in the fact that it was difficult for every one concerned to decide definitely, in terms of dollars and cents, what was fair to all. This difficulty was accentuated by the type of men selected for the State railroad commissions. In many instances political appointees were selected. Fortunately the influence of the State Commissions on the level of intrastate rates has been lessened

by Section 15-A which not only provides for a fair rate of return on the aggregate value of railroad property but also provides the principles that will aid the Interstate Commerce Commission in determining the fair rate of return in the future.

This rate of return is not guaranteed by Congress. The act simply establishes a rule that there shall be a fair rate of return. The plan that Congress had in mind in passing this particular provision was that the prevailing rate structure was to remain in effect unless upon investigation by the Interstate Commerce Commission it was ascertained that it did not provide sufficient revenues. In the event that the investigation proved that the rate level did not produce sufficient revenues, the Commission had the right to adjust the rates so as to provide "as nearly as may be" that rate of return that Congress decided fair and reasonable. This rate of return was to be based upon the combined transportation property investment accounts of the roads in each of the territories, designated by the Commission.

The Commission is permitted to grant this rate of return only when it is certain that the railroads are doing their part in creating an efficient transportation machine. It may establish a schedule of tariffs which will yield a certain percentage upon the value of the aggregate transportation properties only when it is satisfied that the management of these properties is honest, efficient and economical. This clause underlies the whole paragraph. It is the foundation upon which the new Act rests. Congress does not permit the carriers to pass the entire responsibility on to the Interstate Commerce Commission of creating sufficient railroad revenues to attract additional capital and to maintain the capital employed in the existing railroad machine. The work of creating this fund involves a dual responsibility—that of the railroads and that of the Commission.

The 1924 Annual Report of the Commission summarizes its activities in this work.⁸ It brings out the fact that the work of determining the efficiency of each railroad would require a large organization of technical experts. This would require a large

⁸ Annual Report of the Interstate Commerce Commission 1924. Page 7.

expenditure of money. Inasmuch as this sum of money has not been provided, the Commission finds itself handicapped in its work of analyzing the management of each railroad system. At the present time it is relying upon two sources of information—the data filed by the carriers on prescribed forms and upon information gathered at informal hearings. Two special annual reports dealing with the efficiency of operation for the years 1923, 1922, 1921 and 1916 have been issued.

Congress foresaw that it was not possible to make rates, particularly freight rates, that will enable the average railroad to receive an adequate return upon its invested capital without giving to the more favorably situated railroads more revenue than necessary. This fact has kept the level of rates low and many railroads have failed to secure rates adequate to enable them to provide proper facilities. Section 15-A, paragraph five, declares that because it is impossible to establish uniform rates upon competitive traffic which will sustain adequately all the carriers needed to do the business, without giving some of them a net return in excess of a fair return, any carrier receiving such excess shall hold it, in the manner thereafter prescribed, as trustee for the United States. The next paragraph distributes this excess, one-half to a reserve fund to be maintained by the carrier and the other half to a general railroad contingent fund to be maintained and supervised by the Interstate Commerce Commission. Certain of the following paragraphs refer to the purposes to which each portion of the surplus earnings may be devoted.

Paragraph five of this section, in requiring the Commission to establish uniform rates, was considered necessary in order that the business of transportation might be divided equally among all the carriers. Uniform rates are necessary. The weaker roads can not charge higher rates than their stronger competitors. If they did the traffic would flow to the roads with the lower rates. Many undesirable economic consequences would result also from charging shippers different rates for similar services. This section was included so that the weak railroad might be able to earn enough to survive. The remaining paragraphs that follow this paragraph enable needy railroads

to secure help in the form of loans from the fund created by the moneys received by the Federal Commission from the excess profits of the stronger roads.

Very few railroads have objected to this so-called Recapture clause.⁹ The plan does not take from them the entire fruits of increased efficiency in service. Most of them realize that the public has decided definitely to permit the railroad owners only a fair return on the capital invested in railroad properties. The section aims to give the railroad owners a rate of return, moderate in size, but one which will be paid as the dividend dates fall due and thus it tends to re-establish the general credit of the railroads.

The effects of these provisions on the problem of intrastate rate regulation may be best illustrated by a study of the Interstate Commerce Commission's activities soon after the passage of the Act. In 1920, in a proceeding known as *Ex Parte 74* (58 I. C. C. 220) a large increase in both freight and passenger rates was granted, designed to produce sufficient revenues to place the railroads once more on an efficient basis. These increases were made in accordance with Section 15-A, paragraphs two and three, under which the railroads as a whole, or as a whole in each of such rate groups as the Commission might designate, would earn a fair return upon the aggregate value of the railway property used in the service of transportation. The Commission, in this case, divided the country into four rate groups—eastern, southern, western and mountain-Pacific. It next decided tentatively that the aggregate value of the property used in the service of transportation was \$18,900,000,000. (The Commission could not set a permanent valuation figure as the work undertaken in accordance with the Valuation Act of 1913 had not yet been completed.) Its next problem was to determine the increase in rates that would be required to enable the railroads to earn the rule of return decreed by Congress to be fair until March 1, 1922. (Congress had stated that it believed a fair rate of return upon the property used in the service of transportation to be $5\frac{1}{2}$ per cent plus $\frac{1}{2}$ per cent for

⁹ *Dayton-Goose Creek Railway Company v. United States, Interstate Commerce Commission, et al.*, 263 U. S., 456.

betterments not added to capital.) A net operating income of over one billion, one hundred thousand dollars must be provided in order that the railroads may earn the statutory fair rate of return. The Commission decided to give the roads in each of the four territorial rate groups the necessary rate increase. The eastern roads obtained a 40 per cent increase in freight rates, the western roads 35 per cent—the mountain-Pacific roads 25 per cent and the southern railroads 20 per cent. Rates applying between these territories were increased $33\frac{1}{2}$ per cent. Additional increases were granted for the carriage of passengers—not only in the matter of regular fares but also as to the sleeping and parlor car surcharges; for the transportation of milk and cream; and for certain special terminal and in-transit services and privileges. It should be noticed that all the increases were made on a horizontal basis within a particular rate group. This was admitted by the Commission as being wrong in principle but that its action was necessary because of the exigencies of the situation. Its action was justified only on the basis of expediency.

These rate increases did not produce the amount of revenues which all had expected. One minor cause for this unfortunate fact, and one of importance to our discussion, was the refusal of many state commissions to grant the same increases in intrastate state rates and charges as had been allowed the carriers engaged in interstate transportation.¹⁰ Their inactivity resulted in curtailing the revenues of the railroads to a considerable extent and the carriers petitioned the Federal Commission to remove the handicaps imposed upon them by these state commissions. The commission did so in a series of decisions during the years 1920 and 1921. Our purpose in the next chapter is to study the more important of these Interstate Commerce Commission decisions to discover just how the Act of 1920 changed the influence of the Federal Commission over intrastate rates, fares, and charges. A careful study of the reasoning employed by the Commission in deciding to compel the state commissions to raise their intrastate rates to the interstate rate level will indicate the attitude of the Commission.

¹⁰ Annual Report of the Interstate Commerce Commission, 1924. Pages 32-34.

V

THE COMMISSION'S INTERPRETATION OF ITS POWER UNDER
THE TRANSPORTATION ACT

The decision of the Federal Commission in the case of *Ex Parte 74* aroused a storm of protest from a large number of states. Some of them refused to increase any of their intrastate rates and charges to the interstate level. Others were willing to co-operate with the Commission only to a limited extent. The actions of these states required the Commission to investigate their rates and rate structures and as a result, twenty-eight cases were decided by the Commission.¹ No particular section of the country was against the action of the Commission in advancing rates—in fact the states refusing to co-operate with the Interstate Commerce Commission were scattered all over the country.

The Commission decided two of these cases November 13, 1920. They are known as the New York² and Illinois³ rate cases. The next decision to be given out was the Wisconsin⁴ case, decided about two weeks later. These cases are of fundamental importance for two reasons. In the first place, they express the opinions of the Federal Commission in all their fundamental aspects, and secondly, the New York and Wisconsin cases were brought before the United States Supreme Court, which supported the Interstate Commerce Commission in all respects, thus legally establishing its opinions.

The order of the Commission in the New York case was of a general nature increasing intrastate passenger fares, baggage charges, milk and cream rates and imposing Pullman surcharges on all lines within that State. The case was brought before

¹ For a complete list of the citations of these intrastate rate cases, see the 1921 Annual Report of the Interstate Commerce Commission. Pages 32-34.

² Intrastate rates and fares of the New York Central Railroad Company, and other carriers in the state of New York. 59 I. C. C., 290; 64 I. C. C., 55.

³ Intrastate rates within the state of Illinois. 59 I. C. C., 350; 60 I. C. C., 92.

⁴ Intrastate passenger fares of the Chicago & North Western Railway Co., and other carriers between points in the state of Wisconsin. 59 I. C. C., 391.

the Commission by certain New York State railroad companies which protested the action of the Public Service Corporation of New York in refusing to grant the increases allowed by the Commission in the proceedings known as *Ex Parte 74* on the above transportation services. The petition of the carriers asked for relief in accordance with the provisions in Section 13 of the Act of 1920.

In deciding this case, the Interstate Commerce Commission declared that the Supreme Court had long ago given it the right to regulate intrastate fares when such regulation is incidental to the regulation of interstate commerce. Since this decision, Congress had incorporated a provision in the Act of 1920, known as Section 13, which required the Commission to do away with any state discriminations that affected interstate commerce injuriously. It asserted that this provision differed from that of Section 3 in that the latter was of a general nature placing a general obligation upon the Commission to control intrastate commerce under the condition noted above, while the former provision was regarded as a direct command by Congress by which the Commission was specifically required to unify the conditions of transportation charges throughout the nation.

The Commission denied the claim of the New York state authorities that its control over intrastate rates could be exercised *only* when it could be definitely established that the state discrimination actually affected certain persons and localities engaged in interstate commerce. It maintained its opinion on the ground that "the basis of our jurisdiction is our power to regulate interstate commerce" and since this is true "it follows that the decisive factor is whether the rate under consideration injuriously affects interstate commerce." However, the Commission qualified this general statement of its power over intrastate rates by saying that this discrimination had to be of such a nature as to affect interstate commerce to a "considerable extent." It realized that certain discriminations were not of sufficient importance to justify the exercise of its power, but it was certainly emphatic in declaring that whenever it believed a discrimination to be important, there was no limit to the steps it might take to remove it "even although the whole rate structure of a state should be involved."

It is interesting at this point in our discussion to see the change in the Commission's opinion of its power over intrastate rates. The Illinois Passenger fare case, as reviewed by the United States Supreme Court in 1916, did not permit the Commission to issue orders of a general nature. It should be recalled that the Court said in the American Express Case, previously discussed, that in cases of conflict between Federal and State authority, the Commission's orders must be definite and must apply only to those points where an actual unjust discrimination exists. In the Illinois Case it reaffirmed this opinion and declared the order of the Commission void on the grounds that it lacked definiteness. It was necessary for this Federal agency to designate precisely the territory or points to and from which the intrastate rates must or may be readjusted. The discussion which follows shows that the Commission believed that a drastic change in their power had occurred as a result of the Act of 1920. It no longer believed that they were required to issue orders charging the carriers to disobey State-made statutes and regulations which specifically and precisely outlined the exact points at which the unjust discrimination existed.

The Commission continued by stating that its order increasing all rates by means of a horizontal percentage system was made in accordance with Section 15-A, paragraphs two and three. It believed that it had the right to increase intrastate rates as well as interstate rates because it had included all the property of the carriers used in the service of transportation in each of the four groups it had designated. Naturally, the property used for intrastate operations was included because it is impossible to segregate that property used in intrastate transportation from that used in interstate commerce. The operations of both sorts of business are hopelessly interdependent. For fear that this statement should be considered as giving the Commission its fundamental right to control all intrastate rates it was expressly declared that they did not believe that the state's power to control their purely domestic transportation affairs had been taken away by this provision. But, the Commission declared that Congress had authorized it to establish a system of rates which would allow the carriers an aggregate return of $5\frac{1}{2}$ per cent

plus $\frac{1}{2}$ of 1 per cent on the aggregate value of the railroad property used for transportation purposes. Since this is true, and since Congress does have the right to pass any legislation tending to improve the financial strength of the carriers engaged in interstate commerce, "the full control by Congress of this matter is not to be denied on the ground that the carriers' aggregate earnings are a commingling of intrastate revenue and interstate revenue." This statement was based upon the Supreme Court's ruling in the Minnesota Rate case, outlined in a previous chapter.

The decision of the Commission in Ex Parte 74 was the direct result of an investigation which showed that the interstate carriers had an immediate need for increased revenues if the country was to expect adequate transportation services. There was not time for the Commission to investigate the details of individual fares. The record of the investigation showed that both sorts of services are performed under substantially similar circumstances and conditions and that if the carriers of purely New York State traffic were not allowed to charge rates equal to those charged for interstate traffic, that their annual revenues would be decreased by an amount between eleven and twelve millions of dollars. This decreased income to the carriers, most of which are engaged in both interstate and intrastate transportation, was bound to result in "undue prejudice against interstate passengers and shippers and unjust discrimination against interstate commerce." This condition would in time tend to shatter the entire interstate rate structure which the Commission believed to be to the best interests of all concerned in this territory, thus causing the carriers increased difficulty in providing adequate transportation services.

That no injustice might be caused to traffic that was purely intrastate and which was in no way related to interstate commerce, the Commission included in its order a saving clause which reserved to the public using transportation services of this sort the right to appeal for a modification of the order. In view of what the Supreme Court had said in the American Express case and the Illinois Passenger Fares case, it will be interesting to see in the next chapter what the Court has to say about this particular subject.

In the Illinois passenger fares case the Commission enlarged its opinions outlined in the above case. The Public Utility Commission of this state had refused to permit any increases in passenger fares allowed by the Interstate Commerce Commission in *Ex Parte* 74 on the grounds that it had no jurisdiction to authorize fares in excess of those prescribed by the statute of 1907 limiting such fares to two cents per mile. The Illinois carriers secured a temporary injunction against this order and through the Chicago, Lake Shore and South Bend Railway Company, an interstate electric line, a petition was filed under Section 13 in which the action of the State Commission was complained of as being unduly prejudicial and as creating unjust discrimination against interstate commerce. The Federal Commission found that the complaint was justified because the State Commission's order had the practical effect of reducing the earnings on the interstate business and because the practices of the passengers in this territory in defeating the Interstate Commerce Commission's order increasing rates made it impossible to keep these increased rates in effect.

An important discussion involving the difference between Section three and Section thirteen is to be found in this case. The Interstate Commerce Commission had already touched upon this point in the New York case; but in this case it discussed this much mooted question at length. The State authorities maintained that the only power possessed by the Federal Commission over intrastate rates was in only those cases where an unjust discrimination was found to exist which injuriously affects persons or localities in interstate commerce. They claimed that Section 13, paragraph 4, is simply a restatement of the effect of Section three as interpreted by the *Shreveport* case and as a result the Commission had no right to declare that all the rates throughout the State of Illinois discriminated unjustly against interstate commerce.

The Commission did not accept this claim as being valid. It stated that Congress had simply declared in Section three that there shall be no undue or unreasonable advantage, preference, or prejudice as between persons and localities. In Section thirteen it went much further by declaring unlawful

any undue, unreasonable, unjust discrimination against foreign and interstate commerce. This phraseology, it maintained, is not limited to particular persons or localities, but is applicable to such discriminations against interstate commerce in their broadest possible definition. "The term 'commerce' covers the entire field of transportation—the traffic itself and all the instrumentalities and means of carrying it on. The language used is certainly broad enough to cover every discrimination growing out of the relation between intrastate and interstate commerce which injuriously affects the latter." It also declared that Congress included nothing in Section thirteen which would indicate that it meant to interpret Section three and furthermore that legislatures never did pass statutes for the purpose of construing a previous act unless a construction had been applied to a particular statute which the legislature had not intended.

The Commission once again emphasized the provisions of Section 15-A, stating that this provision was necessary to the existence of proper railroad service and to the rehabilitation of railroad credit.

In answering the complaint that this interpretation of the Act of 1920 took away certain sovereign state rights, the Commission declared that the power of regulating interstate commerce had been granted to Congress in order to unify commercial and social conditions throughout the country. An important contribution to the reason why it was necessary and just that Congress should have this power, was included in this decision. Commissioner McChord, who wrote the decision, stated that it was necessary and desirable for the protection of the states themselves. He argued this point by saying that every state was interested in the conditions of transportation in every other state and that a narrow, selfish policy on the part of one state would handicap the commercial operations of all the others. One has only to recall the conditions surrounding the Shreveport case to find a practical example of this. A few states could not be permitted to place national economic and social interests in jeopardy because of their narrow and selfish policy.

The State authorities objected to the manner in which the

Commission had grouped several states together to find the value of the property devoted to transportation services which was to be used as a basis for setting rates. They maintained that the Commission should segregate the property in the State of Illinois from that of the other states and the rates were to be based on the value of the property within the State of Illinois. The Commission refused this claim and pointed to the provision in the Act of 1920 directing it to fix rates so that they would yield a certain rate of return, as nearly as may be upon the aggregate value of the railway properties held for and used in the service of transportation within certain territorial groups, designated by the Federal Commission. This provision certainly does show that it is not the intention of Congress to segregate the intrastate railway properties from those engaged in interstate commerce so that a basis might be established for the determination of intrastate rates.

A most important contribution of this case to our subject deals with Section 15-A in combination with Section 13. The Commission declared that it would be very difficult to establish a schedule of rates so that the carriers would be able to earn the statutory rate of return unless the intrastate business contributed its just proportion to the total revenues. In order that this sort of traffic would contribute its just share to the total income, the rates on this business could not be lower than those prevailing for interstate commerce unless some good reason could be established for the lower rates. In case the intrastate rates were lower, it might be necessary to increase the interstate rates so that sufficient revenues would be provided for the carriers to enable them to earn a fair return on the value of their transportation property. It had been proved moreover, that whenever two different schedules of rates existed at the same time, one for interstate traffic and the other for intrastate business, traffic wherever possible flowed over routes charging the lower rates. This state of affairs caused the carriers a direct loss and thus a direct handicap to interstate commerce which was "unduly, unreasonably, and unjustly discriminatory for those engaged in that commerce."

Other cases were heard by the Commission. Its decisions in

these cases were all based on those set forth in the New York and Illinois cases. Occasionally a different set of circumstances was urged. The Louisiana case⁵ is a good example of a case of this sort. It was brought out by the State authorities and admitted by the Interstate Commerce Commission, that no interstate movement of sugar cane existed; that the movement of this commodity was confined wholly within the State of Louisiana. The State authorities contended that since this was true, no discrimination could exist against interstate commerce with respect to this particular type of traffic. The Commission, on the other hand, declared that the complaint was lodged against the extremely low rates established by the State Commission and that it was unjust for interstate carriers to suffer the loss of large amounts of revenue as a result. In order that the carriers might earn a fair return on their properties used in the service of transportation, this loss would have to be made up by those engaged in interstate commerce. This would be unduly and unjustly discriminatory for those engaged in that commerce and therefore would bring the action of the State Commission under the provisions of Section thirteen. This case clearly demonstrates that no actual interstate commerce is necessary to prove unjust discrimination against commerce between states. It is important moreover, because this case more than any other illustrates best and most clearly the new rights assumed by the Interstate Commerce Commission over intrastate rates and charges.

In the Arkansas case,⁶ the State authorities questioned the propriety of the procedure taken by the carriers in taking the case directly to the Interstate Commerce Commission, disregarding the State Commission entirely. The Federal Commission did not accept this view, stating that a carrier who believed a rate too low from a revenue point of view may apply directly to the Federal Commission for relief and absolutely disregard the State authorities. It was for the plaintiffs to

⁵ Intrastate rates, fares, and charges of the Morgans' Louisiana & Texas Railroad & Steamship Co., and other carriers in the state of Louisiana. 60 I. C. C., 467.

⁶ Intrastate rates, fares, and charges of the Missouri Pacific Railway Co. and other carriers in the state of Arkansas. 59 I. C. C., 471.

decide upon the course of procedure and were they to decide to take the case to the Commission, it was for the latter to decide the case upon its own merits. This matter had been decided by implication in the New York case, but the ruling was stated definitely for the first time in this case.

The South Carolina Fares and Charges' is an important one in which the Commission still further extended its jurisdiction over intrastate rates and fares which did not injuriously affect interstate commerce to a considerable extent. It will be recalled that it had stated in the New York decision that the unjust discrimination must be of considerable extent before it would issue an order invalidating a decision of a state commission. In the South Carolina case the charges established by state authority were not considered by the Federal Commission as having an apparently substantial effect upon the revenues of the carriers. The Commission justified their decision to raise these rates by declaring that if this "same charge were established throughout the Southern group, and if similar discriminations were permitted in other minor rates, fares and charges, the effect upon revenues might be considerable." This statement shows conclusively that the Commission enlarged its former intention of declaring a discrimination to be unjust only when it appeared to have a considerable effect upon interstate commerce. The amount of revenue involved was of no consequence. All that the carriers had to present was a set of facts showing that the intrastate rates were lower than the interstate rates and that this might have an adverse effect upon their ability to earn the fair rate of return.

This was demonstrated in this same case when the Commission discussed the Conductors' penalty charge—a charge of 15 cents on all persons who had not purchased their ticket before boarding a train. The Commission admitted that the charge was not levied for the purpose of raising revenue but since it was established for the sole reason of facilitating the movement of passengers both in interstate and intrastate commerce, it was permissible for the carriers to charge a reasonable penalty charge.

The Nebraska⁸ and Texas⁹ rate cases are other examples of decisions of the Commission illustrating its opinion as to its rights under the Act of 1920. In these cases, both State commissions had established intrastate rates which when taken with the interstate rates yielded a fair return upon the total value of the property used in the service of both sorts of transportation within the respective State boundaries. They declared that if intrastate rates were raised to the level of interstate rates, the people of Nebraska and Texas would be contributing an unfair proportion to the income of the already well remunerated railroad carriers. The Commission referred these two State commissions to the Illinois case in which they had declared that Section 15-A had provided for a system of group rates and aggregate returns. Therefore, the Commission believed that it was justified in disregarding State lines in the setting of rates. This opinion was supported by the general statement that "differences in judgment among the several State commissions, if each could and would create a rate group of its own, would obviously nullify the fundamental purposes of the transportation act." This position was also taken in the Georgia and Florida cases and in several others.

In the Arizona case¹⁰ the State Commission sought to justify its action by declaring the management of the railroads inefficient. It referred the Interstate Commerce Commission to the clause in Section 15-A which required rates to be so fixed as to yield as nearly as may be a fair return on the value of railroad property used in the service of transportation, provided that the management of the railroads are operated under "honest, efficient and economical management." It based its contention on two points—first, that one carrier, the Arizona Eastern, leases the Phoenix and Eastern. The two railroads parallel each other for a certain distance. There is no need for two sets of

⁷ Intrastate rates, fares, and charges in the state of South Carolina. 60 I. C. C., 290.

⁸ Intrastate rates, fares, and charges of the Union Pacific Railroad Co. and other carriers in the state of Nebraska. 60 I. C. C., 245.

⁹ Intrastate rates and fares of the Gulf, Colorado & Santa Fe Railway Co. and other carriers in the state of Texas. 60 I. C. C., 421; 62 I. C. C., 591.

¹⁰ Rates, fares and charges applicable between points in the state of Arizona. 61 I. C. C., 572.

tracks and yet according to the Act of 1920 rates must be based upon the aggregate value of all the properties engaged in transportation. The second objection dealt with the corporate relationship existing between the Arizona Eastern and the Southern Pacific. It was brought out that the latter controlled the former but that each maintained a separate corporate existence. The Southern Pacific carries a great deal of material for the Arizona Eastern—the carriage of which should be free or at least at reduced rates. Neither of these two contentions was admitted by the Federal Commission on the ground that the Arizona Corporation Commission's claims were insufficient to prove definitely that the management of these railroad properties was dishonest, inefficient or uneconomical.

The last case decided by the Commission as a result of its decision in *Ex Parte 74* was the Kansas case.¹¹ In this case the Interstate Commerce Commission ordered the carriers to raise the rates found to be discriminatory. It had been proved that a large part of the intrastate rates, established by the Kansas Court of Industrial Relations, were as high as the interstate schedule of rates set up by the Federal Commission. Nevertheless, this fact did not deter the latter commission from issuing an order, setting aside and "freezing" the entire intrastate schedule of tariffs. The effect of this order was to authorize the Kansas carriers to determine what rates were discriminatory and to advance these rates up to the point which had been declared by the Commission to be reasonable, for interstate commerce. This order took away from the Kansas Commission, the right to regulate intrastate railroad rates until the Interstate Commerce Commission gave it permission to do so—thus "freezing" the Kansas intrastate tariffs.

The term "freezing" first became popular during this period, although it had existed in practice since 1914. Whenever the Interstate Commerce Commission issued an order declaring certain intrastate rates unreasonable, specifying the rates that should be put into effect, it took away from the state commission the right to regulate rates until it issued an order

¹¹ Intrastate rates, fares, charges in the state of Kansas. 62 I. C. C., 440.

vacating this particular order. The vacating order is given only when the state commission, of itself, issued a similar order increasing those rates over which the Federal Commission had assumed control. In some cases, a long period of time intervened before the state commission had its power of regulation returned to it. An example of this sort occurred in the Shreveport case. Although this case was decided in 1914, it was not until a period of almost eight years had elapsed before the two commissions reached a harmonious agreement. Such a condition is to be deprecated since it makes for an inelastic system of local rate regulation, injurious to the progress of the nation.

These cases express the opinion of the Federal Commission with respect to its control over intrastate rates under the provisions of the Act of 1920. To sum up the preceding cases, it may be said that the reasoning employed in the New York and Illinois cases is fundamental to the decisions made in all of the other twenty-six cases resulting from the decision in *Ex Parte 74* and those cases that have come before its attention since this notable series of decisions. In short, the Commission declared that Section thirteen increased its power over intrastate railroad rates; that Section three as interpreted by the Supreme Court was a general provision which did not command the Commission to supervise intrastate rates while Section 13 was mandatory upon it; that the type of discrimination must be of considerable importance before it would interfere in the decisions of state-made laws or decisions. This last point was qualified in the South Carolina decision to the effect that the actual amount of revenue lost to interstate carriers as a result of a State statute or decision did not influence the order of the Commission requiring the carriers to raise all rates to the level decreed reasonable. The Commission also maintained that the inclusion of the phrase "interstate commerce" entitled it to the exercise of their regulatory powers over intrastate commerce as regards all the instrumentalities and means of carrying on such commerce defined in the broadest possible terms.

In discussing Section 15-A, the Commission declared that it had the right to regulate the rates of both intrastate and interstate commerce since Congress had ordered it to allow the car-

riers a fair rate of return, as nearly as may be, upon the aggregate value of their property, in groups to be defined by it. This was valid because of the impossibility of segregating intrastate property from the interstate property used in transportation and because Congress has the power of enacting any legislation that would tend to improve the financial strength of interstate carriers. The Commission also emphasized its power to group several states together in determining the valuation basis for the purpose of fixing rates. It made no difference that the rates within a particular state did yield a fair return on the value of the property devoted to intrastate transportation. It declared moreover, that there need be no actual interstate transportation of a particular commodity in order that the intrastate traffic in this commodity may be brought under its control. If it could be proven that the rates on this commodity carried within the boundaries of a certain state were so low as to reduce unduly the total revenues of an interstate carrier, this fact by itself was sufficient to show that interstate commerce was being affected adversely by the orders of the state legislature or state agency.

The effect of this reasoning was of far-reaching importance. Even though the Commission declared that Section thirteen increased its power over intrastate railroad legislation, Section thirteen, by itself, did not materially change the Supreme Court's interpretation of Section three. The reasons have been given in the previous chapter. Commissioner Eastman, who dissented in a number of these cases, maintained that the Commission had exceeded its lawful powers inasmuch as its orders were not based entirely upon Section thirteen, but upon Section 15-A. He declared that the carrier's petitions were all based upon a difference in the amount of revenues contributed by each sort of traffic. Whenever the Interstate Commerce Commission had granted them an increase in their interstate business, the State Commissions, automatically, must grant a similar increase, for otherwise the provisions of Section 13 would be involved and the rates included in the order would be "frozen." No actual evidence of an undue, unreasonable, or unjust discrimination against a particular person or locality need be presented

to the State Commissions. In fact, the request of the carriers to the State authorities for a similar advance is now purely a matter of courtesy rather than one of necessity. (The Commission had brought this point out in the Arkansas case.) In short he declared that the state commissions have no discretion in the matter, except to ratify the action of the Interstate Commerce Commission, thus depriving the states of the most important part of their control over intrastate railroad regulation.

Commissioner Eastman did not believe that Section 13 changed the Supreme Court's interpretation of Section three.¹² He bases his opinion upon the fact that he does not interpret the words "undue discrimination" as "undue burden." If the latter phrase was adopted as interpreting the former, it would be quite possible to declare unlawful a low intrastate schedule of rates without presenting evidence that any particular intrastate rate did injuriously affect a person or locality outside of the state. He emphasized the fact that these two words had been included in the original provision, but they had been struck out because of the possibility of this interpretation. He concluded his discussion of Section thirteen by declaring that the language used in Section three "is quite as broad as the words in Section thirteen." His opinion on this point, however, seems too narrow. The opinion has already been expressed in this paper that the latter section deals with a particular phase of discrimination while the former deals with all types of discrimination. It is an all-embracing, all-inclusive provision.

This Commissioner erred, however, in stating that since Section thirteen did not change the meaning of Section three that the Commission had no right to raise all intrastate railroad rates, regardless of specific proof that all these rates were discriminating injuriously against interstate traffic. He did not interpret correctly Section 15-A, which required the Commission to fix rates so as to yield a fair return on the railroad property used in transportation. It would be impossible to establish an interstate rate structure capable of yielding this rate of return without the complete co-operation of every state authority.

¹² Dissenting opinion of Commissioner Eastman. Intrastate rates and fares of the New York Central Railroad Company and other carriers in the state of New York. 59 I. C. C., 299.

Were every state authority to substitute its judgment for that of the Federal Commission, the latter's power would be valueless. Furthermore, it would automatically create an unjust discrimination which could be removed under Section thirteen and which had been removed under certain conditions under the provisions of Section three.

It is neither Section three nor Section thirteen that are the most important provisions giving an almost complete control to the Federal Commission over the intrastate rate levels. Its right to control almost completely these rate levels comes fundamentally from Section 15-A, paragraphs two and three. It is the practical effects of these two paragraphs taken together which cause the difference between the two rate structures in the first place. Section three or thirteen can then be invoked in order to bring the two rate structures into harmony with each other. It is the combination of Section 15-A and either one of these two sections, preferably Section 13, since it deals specifically with this subject, that enables the Interstate Commerce Commission to issue orders relating to intrastate railroad rates in which it has not proved that an undue and unjust discrimination exists as to particular rates in both kinds of commerce. All that the Federal Commission assumed it had to show was that intrastate commerce was not bearing its just proportion in the matter of gross income. In case this was found to exist or that it might result in the future, it ordered the carriers to make the necessary adjustment of rates so as to do away with this unfairness. These two sections, when used together, allow this agency practically to dictate the share of receipts which intrastate traffic must contribute to the whole. This combination of provisions therefore enlarges the powers of the Commission under the interpretation of Section three as given by the Supreme Court in the *Shreveport* case. Section thirteen by itself never would have given the Commission such powers, for under the provisions of this section and of Section three it is necessary to show that a condition exists whereby the difference in particular rates existing between state and interstate tariffs has brought about a change in the movement and volume of traffic. In both cases this discrimination must be of such a sort as to affect interstate

commerce injuriously. Section 15-A removes the necessity of showing that certain localities and individuals outside of a particular state are being harmed. It brings in the impersonal element in that it requires the Commission to disregard not only state laws and decisions but also state boundary lines in the setting of rates, so as to yield interstate carriers a fair return on all their transportation properties.

The opinion expressed in this paper regarding the similarity of Sections three and thirteen are substantiated by Commissioner Campbell¹³ in presenting his dissenting opinion in the Kansas case decided July 6, 1921.

He declares that he is in perfect accord with Commissioner Eastman in the similarity of conditions prevailing between Sections three and thirteen. He declares that in both sections, Congress requires that "in order to take jurisdiction over intrastate rates (that the Interstate Commerce Commission) must after full hearing find discrimination." This point was emphasized also by Commissioner Hall at the hearing held before the United States Senate Committee on Interstate Commerce in 1922. This Committee had to consider certain bills the purpose of which was to modify certain provisions of the Transportation Act of 1920. Many prominent railroad attorneys and state commissioners were just as emphatic as he in declaring that Section thirteen by itself did not change the meaning of Section three as interpreted by the Supreme Court and that the real change came by combining Section thirteen with Section 15-A.¹⁴ This opinion is also made authoritative by the statement of the United States Supreme Court in its discussion of the Wisconsin rate case, which will be considered in the next chapter.

In the previous chapter it was brought out that the intention of Congress in passing the Transportation Act of 1920 was to

¹³ Dissenting opinion of Commissioner Campbell. 62 I. C. C., 459.

¹⁴ Opinions of prominent Railroad Attorneys. Mr. Frederick H. Wood, General Attorney and Commerce Counsel of the Southern Pacific Company. Statement, Modification of Transportation Act, 1920. Page 342.

Ibid, Page 378. Statement of Mr. H. A. Scandrett, Valuation Counsel and Commerce counsel of the Union Pacific Railway System.

Ibid, Page 691. Statement of Honorable H. C. Hall, formerly member of Interstate Commerce Commission.

build up a system of railways prepared to handle all the interstate traffic of the country efficiently and economically. In order that this purpose might be accomplished it enacted legislation aimed to give the owners of railroad properties an opportunity to earn enough to maintain their properties and equipment in such a state of efficiency as to enable them to carry this burden easily. The Act puts the railroad systems of this country more completely than ever under the control of the Interstate Commerce Commission, which has accepted this responsibility with energy and determination. Its decisions in the many cases following its orders in *Ex Parte 74* show that it has a clear vision of Congress' purpose and that it intends to carry out this great purpose. Its activities in this direction were at first hampered, for several states took their cases to the Federal courts. The next chapter discusses the Supreme Court's interpretation of the Act of 1920 and its attitude toward the powers assumed by the Interstate Commerce Commission under that Act.

VI

THE ACT OF 1920 AND THE SUPREME COURT

The year 1920 marks an extension of the Interstate Commerce Commission's control over the general level of intrastate railroad rates when they are considered to affect interstate commerce adversely. The Commission believed that it was no longer necessary to confine its orders to cases in which it had to prove definitely that an actual discrimination against a particular locality or person engaged in interstate commerce existed. It was only necessary for the Federal Commission to show that the orders regulating intrastate railroad rates were merely incidental to the adequate regulation of interstate commerce and necessary to its efficiency. In the many cases following the Commission's decision in *Ex Parte 74*, it was decided that an intrastate schedule of rates lower than the interstate schedule of rates would lower the interstate carriers' revenue. This lower revenue would handicap these carriers in their duty of furnishing an adequate transportation system capable of keeping up with the country's economic and social progress, thus creating an undue, unjust and unreasonable discrimination against interstate commerce. The broadening of the meaning of the term "discrimination" in this manner was not acceptable to many state commissions. They realized that this concept of the term was far different from that which had existed under Section three as interpreted by the Supreme Court in the *Shreveport* case. They realized that the powers assumed by the Federal commission in the many cases decided during the period 1920-1922 limited their most important railroad regulatory power. It was only natural that some of these cases were taken to the Supreme Court of the United States in order to establish the legality of the Commission's orders.

Three decisions have been handed down by the Court which are of outstanding importance. They are known as the *Railroad Commission of Wisconsin vs. Chicago, Burlington and*

Quincy Railroad Company;¹ *New York vs. United States*;² and the Dayton-Goose Creek Railway Company vs. The United States, Interstate Commerce Commission et al.³ All of these cases upheld the authority assumed by the Federal Commission and by Congress in the Act of 1920.

It has been brought out that the Wisconsin rate case, as it is popularly called, arose out of the investigation by the Interstate Commerce Commission of interstate railroad rates throughout the United States. The Commission in endeavoring to comply with Section 15-A of the Act of 1920 ordered a general horizontal increase for the carriers in the group of which the Wisconsin carriers were a part. The carriers, upon receiving this order, immediately applied to the Wisconsin Railroad Commission for corresponding increases in the intrastate railroad rates, fares and charges. The Commission denied the increase in passenger rates on the sole ground that a state statute prescribed a maximum of two cents per mile for all intrastate passenger traffic and that this made it impossible for them to assume jurisdiction over this particular sort of traffic.

The carriers immediately petitioned the Interstate Commerce Commission, which ordered the carriers to disregard the order of the Wisconsin Railroad Commission and to put into effect the interstate rates which they had declared reasonable on the previous occasion. The Commission believed it was justified in taking this action because of the following facts:—

(1) The railroads provided the same services and facilities for both the intrastate and interstate traffic.

(2) The circumstances and conditions of transportation were substantially similar for both the interstate and intrastate services.

(3) Undue preference and prejudice were shown by the marked falling off of sales of tickets from border line points in Minnesota and Michigan to similar points in Wisconsin and by the marked increase in sales of local tickets from corresponding border line points in Wisconsin to stations in Wisconsin.

¹ *Railroad Commission of Wisconsin vs. Chicago, Burlington and Quincy Railroad Company*, 257 U. S., 563.

² *State of New York vs. United States, et al.*, 257 U. S., 591.

³ *Dayton-Goose Creek Railway Company v. United States, et al.*, 263 U. S., 455

(4) The Commission certified that the fare necessary to *meet the requirements as to net income* of this interstate railroad group, under Section 15-A, *based upon the carrier's aggregate value of their property* used in the service of transportation, was 3.6 cents per mile, and that *the carriers would lose about six millions of dollars by their failure to get this rate.*

The New York case should be considered here since it was a direct result of the same order that brought about the Wisconsin rate case. The former case differs from the latter in that it was a bill in equity against the United States and the Interstate Commerce Commission, brought by the State of New York through its Attorney General to enjoin the enforcement of the Commission's order. It was a direct proceeding to set aside an order of the Interstate Commerce Commission and as a result the complaint of the State authority had to be along different lines than was the defense of the Wisconsin Railroad Commission. The case in which the Wisconsin Commission was the defendant was a suit brought by a railroad against the State authority to prevent the latter from penalizing the railroads from complying with an order of the Federal Commission. The Commission and the United States were not parties to this suit.

The New York State authorities were required to attack the order of the Commission differently because it had been decided by the Supreme Court previously that a "Federal District Court has jurisdiction of a suit to enjoin the enforcement of an order of the Interstate Commerce Commission authorizing an increase in rates, the invalidity of which is asserted not on the ground that the new rate is unreasonably high, or that it is discriminatory, or that it is a mere error in the action of the Commission, but on the ground that the Commission in making the order, exceeded the statutory powers." As a result the New York State authorities claimed the Commission's formula of raising all state rates to the level of interstate rates was too rigid to be practicable and too unjust to have been intended

by Congress. They claimed that state commerce could not be regulated in order to provide revenues for interstate commerce under the guise of regulating the latter. In addition, they brought out the fact that the New York Central Railroad was operating under a state charter, prohibiting a higher rate than that which prevailed before federal control in 1917 and that Congress could not destroy for all time the right of a state to make such a contract. Other claims of a similar sort were advanced to show that the State authorities realized the method of attack they were required to make in this case. They did not have to present any "substantial evidence to sustain a material finding as a basis for attacking the order." This suit when combined with that of the Wisconsin case, gives the student two cases, which attack the orders of the Commission from different angles.

The New York State Commission refused to allow the carriers engaged in intrastate business to charge higher rates on their intrastate passenger and milk business until the carriers had filed a petition with it. The rates on these two transportation services were fixed by state statute or in the charters granted to the railroads by the State. The statutes did not permit the State Commission to change these rates until they had made a thorough investigation. The carriers refused to present any evidence when asked to do so by the State Commission, declaring that since the Act of 1920, the state authorities had no right to decide upon the reasonableness of intrastate rate increases after an order to this effect had been issued by the Interstate Commerce Commission. They maintained that the State Public Service Commissions were required to approve such rate increases without question. It seems quite evident that the carriers intended to make this a test case for it seemed reasonably certain that the New York State authorities would have approved the increases ordered by the Federal Commission. (They had agreed already to grant the increases ordered by the Federal Commission on the freight business, since they were not handicapped by state statutes.)

The Court in deciding these two cases placed a great deal of emphasis upon the reduced revenues of the carriers resulting from their failure to receive state permission to raise certain

intrastate rates. It reviewed Section 15-A, a provision ordering the Federal Commission to fix a schedule of rates so as to yield the interstate carriers, as nearly as possible, a fair return on their transportation properties. It was apparent to the Court that the action of both State commissions was thwarting the work of the Federal Commission to create a railroad system capable of efficiently serving the public. If the State commissions were permitted to cause the interstate carriers to receive reduced revenues on their intrastate business, the Federal Commission would be required to authorize these carriers to increase the rates on their interstate traffic in order that the deficiency in their gross income from transportation might be made up. This was only logical, since Congress had declared that the carriers were entitled to a certain rate of return on the aggregate value of their properties used in the service of transportation. The additional increase in interstate rates would result in unjust and unreasonable discrimination against persons and localities engaged in such commerce. This would cause the discrimination to come within the provisions of Section thirteen, thus giving the Interstate Commerce Commission the right to remove the unjust state-made order by authorizing all intrastate rates and fares to be increased to the level of the interstate schedule of rates.

This general statement was qualified, however. The Court emphatically stated that the Commission's control over both interstate and intrastate commerce did "not extend to or involve a general regulation of intrastate commerce. The orders of the Interstate Commerce Commission should be directed to *substantial disparity* which operates as a real discrimination against and obstruction to interstate commerce, and must leave appropriate discretion to the state authorities to deal with intrastate commerce *as between themselves, on the general level* which this Commission has found to be fair to interstate commerce."

Too much attention can not be paid to the last part of the above quotation. Section 15-A in itself does not give the Interstate Commerce Commission complete and actual control over individual intrastate rates. This section, by itself, simply grants this Federal Commission the power to require state

authorities to establish an intrastate schedule of tariffs which will enable it to comply with the provisions in Section 15-A. The power of the Commission over intrastate rates obtained from this section is derived from its general powers to prescribe just and reasonable rates. This power is no different from that which it had for some time past and it never had been used or construed to include the right to prescribe intrastate rates. The Court approved this section, thus establishing its legality, because it believed that it was the paramount duty of Congress to develop interstate commerce and its agencies. Since the income from intrastate commerce (almost one-third of the gross freight and passenger receipts) is extremely important to the development and maintenance of an adequate national railway system, the Court believed that a reduction in this amount would have an adverse and injurious effect, and the Federal Commission was held to have the power to prescribe the share which intrastate traffic should contribute to the whole.

The Court did not countenance the Interstate Commerce Commission's statement to the effect that the words "unjust discrimination against interstate and foreign commerce" gave it an increased power over particular intrastate rates under Section thirteen because these words gave them the right to regulate all the instrumentalities and agencies engaged in interstate commerce. It held that when any undue or unjust discrimination against interstate commerce exists because of state action, that the Commission had the right to end this discrimination against "*interstate and foreign commerce within the ordinary meaning of these words.*" It had always been maintained that Congress had the power to prevent the common instrumentalities of interstate and intrastate operations from being injured in their intrastate operation.

The affirmative power of Congress to develop the agencies of interstate commerce is clear. Congress can impose any reasonable condition on a state's regulation of an interstate carrier's property used for intrastate commerce that it believes essential, provided this is incidental to the regulation of interstate commerce. The constitutional power of Congress over interstate commerce makes it supreme in this field. The Supreme Court

has held that the states can place no undue limitation upon the earning power of the agencies of interstate commerce employed in state commerce. Congress is held to possess the power to make the national railroad system adequate to the needs of the country by securing for it a reasonably compensatory return for all the work it does. Chief Justice Taft was very emphatic in this statement. He declared that "the authority of Congress extends to every part of interstate commerce and to every instrumentality or agency by which it is carried on, and the full control of Congress of the subjects committed to its regulation is not to be denied or thwarted by the commingling of interstate and intrastate operations." This does not mean that "the nation may deal with the internal concerns of the state, *as such*, but that the execution by Congress of its constitutional power to regulate interstate commerce is not limited by the fact that intrastate transactions may have become so interwoven there with that the effective government of the former incidentally controls the latter." The power of a state to regulate its internal commerce is subject to invasion by Congress, when this right in any way tends to subject an instrumentality of interstate commerce to harmful and injurious state legislation.

In the New York case, the State declared that Congress could not interfere since the state had a charter contract with the New York Central Railroad in which the latter had agreed not to charge more than two cents per mile for the carriage of passengers between Albany and Buffalo. It based its contention on Paragraph ten, Article one, of the Constitution, which provides that "no state shall . . . pass a law . . . impairing the obligations of contracts and does not in terms restrict Congress or the United States." The court held, however, that it made no difference in this case since the contract "directly obstructs and thus regulates that commerce which is carried on among the states." And since this commerce is subject to the power of Congress nothing can stand in the way of that governing body. This decision did not make void the contract between the state of New York and the New York Central Railroad and the latter was not compelled to abandon its charter in order to be able to charge a higher rate than that which was stated in the original

charter. (The state had stated that this was necessary before the railroad could raise its rates.)

In the Wisconsin case the counsel for the state of Wisconsin attempted to maintain that the valuation required for purposes of section 15-A which was to be found according to section 19-A was to be only that property and equipment of interstate carriers which is used in commerce among the states and must be set apart from that property and equipment which is used in intrastate commerce. This statement implies the fixing of intrastate rates, using as a valuation basis, the value of the railroads' intrastate physical equipment. The railroads objected quite strenuously to this statement in that they could not see how it was possible so to segregate the interstate properties from those engaged in intrastate commerce. They contended that the same properties were used for both kinds of commerce. For example, the same train usually carried both interstate and intrastate business, and the same terminal was used for both sorts of commerce. Many other examples were cited, but these are sufficient to show the difficulties with which the Interstate Commerce Commission must struggle, if it were necessary to provide the two sets of valuation figures.

The court in deciding this point agreed with the railroad authorities. It refused to require the Commission to determine the value of the equipment used in the two kinds of commerce, because of the language of Section 15-A, which states that the percentage is to be calculated "on the aggregate value of the railway property of such carriers held for and used in the service of transportation." It also declared that the statute contemplated the use of the valuation figures in a reasonably short time, and since so much of the total railroad properties is used in both services, this would be an impossible task for the Commission. Moreover, this would work against the will of Congress and against the best interests of the people and this in itself, the court held, would have been sufficient to disapprove the objection of the state authorities to the valuation figures set up by the Interstate Commerce Commission.

In both the Wisconsin Case and the New York case, the Commission ordered a general increase in intrastate rates and

fares to correspond to the interstate charges. It did so because it believed that this was the only method which would remove the undue discrimination against interstate commerce. As a result of this general order, the Commission included a so-called "exception or savings clause" whereby the order could be modified by the Commission as to any specified intrastate rate if that rate "were not related to the interstate fares or charges in such a way as to contravene the provisions of the Interstate Commerce Act."

The Supreme Court in discussing this point in both of these cases stated that "a showing that passenger fares work an undue discrimination against travelers in interstate commerce and against localities in *typical* instances numerous enough to justify a finding against a large class of fares is not sufficient evidence of discrimination against persons and localities, within the meaning of the Act of 1920, to justify a *state-wide* order of the Interstate Commerce Commission making a horizontal increase in all intrastate passenger fares to correspond with interstate rates where it is clear that such an order will include many rates not within the proper class or reason of the order." As a result a savings clause under these conditions would not be allowed to give the order validity.

However, it did *not* declare the savings clause in these cases invalid on the ground that it violated the provision in Section one, Paragraph 2-A, to the effect that the Commission was not to regulate traffic wholly within one state, "so long as these orders as to intrastate traffic are *incidental* to the regulation of interstate commerce and necessary to its efficiency." This was especially true when the Interstate Commerce Commission was attempting to comply with the provisions contained in Section 15-A. If it were possible for a state commission to find some case whereby it could be proved definitely that there was no relation between intrastate and interstate commerce, this savings clause would enable it to bring the case before the Federal Commission and the wrong would be rectified. This point is very important in that it shows the extent to which the powers of the Commission have been broadened in bringing about a general increase in intrastate railroad rates, because of

the inclusion of Section 15-A in the Act of 1920 to Regulate Commerce. Only a few years before, the Commission had been refused the exercise of a savings clause because it lacked the necessary authority and today the Supreme Court has decided that because of Section 15-A, the Interstate Commerce Commission does have the power to include a "savings clause" in a general order to increase rates.

The opinions of the Supreme Court in these two cases were restated in two other cases decided by it during the same year (1922). The state of North Dakota vs. Chicago and North Western Railway Company,⁴ and the State of Texas vs Interstate Commerce Commission and Railroad Labor Board.⁵ In both of these cases the court decided in favor of the Interstate Commerce Commission in as much as it believed that the Commission had not gone beyond its regulatory powers. In the latter case the Court stated, after dismissing the bill because of its limited original jurisdiction, that "it should be observed that some of the provisions of the transportation act, assailed by the bill, have recently been upheld in other cases brought before us in regular course on appeal from the decrees in the district courts." The cases to which the Court referred to as having been decided recently, were the New York and Wisconsin Passenger Fares Cases.

The Dayton-Goose Creek Railroad Company vs. United States case is another case decided by the Supreme Court relating to intrastate rates. More particularly, it establishes the validity of certain provisions in Section 15-A not discussed in the Wisconsin and New York cases. The provisions discussed in this case are those dealing with the recapture of excess earnings by the Federal Government. These provisions were outlined in a previous chapter. They enable Congress to maintain uniform rates for all shippers and yet keep the net return of railways, whether strong or weak, to the varying percentages that are fair, respectively for them. "The recapture clauses are thus the key provisions of the whole plan."

This case refers to the subject of intrastate rates in that it was contended that the recapture clause, by reducing the net

⁴ State of North Dakota ex rel., William Lempke v. Chicago & Northwestern Railway Company *et al* 257 U. S. 485.

⁵ State of Texas v. Interstate Commerce Commission, *et al.*, 258 U. S., 157.

income from intrastate rates, invaded the reserved powers of the states and was in conflict with the 10th amendment of the Federal Constitution. The Court held that "in solving the problem of maintaining the efficiency of an interstate commerce system, which serves both the states and the nation, Congress is dealing with a unit in which state and interstate operations are often inextricably commingled. When the adequate maintenance of interstate commerce involves and makes necessary on this account the incidental and partial control of intrastate commerce, the power of Congress to exercise this control has been clearly established."

The transportation act seeks affirmatively to build up a system of railways prepared to handle promptly and efficiently all of the interstate traffic of the country. The court further states that "the combination of uniform rates with the recapture clause is necessary to the better development of the country's interstate transportation system as Congress has planned it. The control of the excess profits due to the leveling of the whole body of rates is the heart of the plan. To divide that excess and attempt to distribute one part to interstate traffic and the other part to intrastate traffic would be impracticable, and would defeat this plan. This renders indispensable the incidental control by Congress of that part of the excess possibly due to intrastate rates, which if present, is indistinguishable."

After the Commission has required a railroad engaged in intrastate commerce to raise its rates to a level which will give all the railroads in a certain territory or group a fair return on the total aggregate value of their properties, it may require that railroad, even though it is engaged primarily in intrastate traffic, to turn back a part of the net earnings which it may possibly have earned from its intrastate operations. And these sums may be used to aid those interstate railroads that are considered weak. The Supreme Court holds that Congress desires to build up a strong national transportation system, and that Congress could achieve this purpose only if it put the railroad systems of the country more completely than ever under the "fostering guardianship and control" of the Commission. At the same time Congress places a sufficient income at the disposal of the railroads to enable them to maintain a high state of efficiency.

VII

HISTORICAL DEVELOPMENT OF CO-OPERATION

The previous chapters have brought out that the Interstate Commerce Commission has been given an increased power over intrastate rate regulation under the new provisions incorporated in the Act of 1920. This power was of such a nature as to make more certain a level of rates uniform throughout the country, varying only with conditions and circumstances prevailing within certain economic territories. Such centralization of authority is highly desirable for it remedied many of the problems arising when several governments are regulating the same transportation agency. It meant that the regulation of the railroads would be more harmonious not only as between the states on the one hand and the National Government on the other, but also as between the rules and regulations passed by the several states. Since there is a very close relationship between interstate traffic and intrastate traffic, the previous differences resulting from the numerous laws passed by the numerous governments had encouraged jurisdictional disputes resulting in a condition that did not promote the welfare of the public nor the welfare of the railroad corporations.

Several years before the decision of the Supreme Court in the Wisconsin Rate Case certain members of the Federal Commission and many of the state commissioners were planning the establishment of some system by which a more harmonious system of regulation by both parties might be secured. A co-operative system was considered by these individuals as being the best method of bringing about harmony of action and a concurrence of opinion, thus doing away with discord, antagonism and opposition. It was felt that a system of this sort would bring out the best thoughts and abilities of the commissioners engaged in the solution of a particular problem. It meant that each decision of the Commission would consider not only the national aspects of the problem but also the interests of particular localities. In this way, the ideas and ideals

underlying our dual form of government would be carried out most effectively.

These thoughts were usually expressed in general terms in the annual reports of both the Federal Commission and the National Association of Railway and Utilities Commissioners. For example, in 1908, during the annual meeting of the latter association, its president, Mr. Charles C. McChord—until recently a commissioner of the Interstate Commerce Commission—strongly urged a close co-operation between both types of commissions. Several years prior to Commissioner McChord's statement, several members of the Interstate Commerce Commission, such as Mr. Thomas M. Cooley and Mr. Martin A. Knapp, had also supported the principle of co-operation heartily. No action was taken by either side and both types of commissions continued to perform their respective functions independently of one another for the most part.

The decision of the Supreme Court in the *Shreveport* and *American Express* and *Illinois* cases gave the Federal Commission the power to condemn state rulings in so far as they injuriously discriminated against interstate commerce. This power frequently required this agency to revise intrastate rates and fares. This state of affairs no doubt, hastened the progress of co-operation for following these decisions the annual reports of both the Federal Commission and the National Association of Railway and Utilities Commissioners contain statements and resolutions urging Congress to give the former agency the right to confer officially with state commissions in the solution of common problems. In 1916 the Interstate Commerce Commission stated that it was advisable to reconcile the efforts of both regulatory agencies by means of a single record.¹ In order that this might be done legally it requested Congress to authorize this agency to co-operate with State Commissions. It advised Congress that by granting this power it would not necessarily give up any of its essential authority to control the regulation of these problems arising from a conflict of interstate and intrastate jurisdiction.

¹ Annual Report of Interstate Commerce Commission, 1916. Pages 90-92.

Congress did nothing about this recommendation. In its next annual report, the Commission again restated its position on this question.² It went further, however, in that it brought out that it had already entered into a series of co-operative hearings in order to promote this sort of action. The report stated that:

"With the view of promoting this kind of co-operative action, hearings have been held in a half-dozen different states, which were in fact, although not in law, joint hearings of the Interstate and the respective state commissions. In one instance these hearings extended through many weeks and . . . we believe that what has already been accomplished has been distinctly in the interests of all the affected parties and that a proper basis has been laid for final disposition of questions that have vexed the citizens and authorities of the respective states as well as the carriers operating under these conditions, so that it will be possible for us to carry these proceedings to a final conclusion with substantial harmony of action on the part of the respective authorities."

Its 1918 report also contained the recommendation³ that it be authorized to establish a relationship between itself and the respective state authorities so as to eliminate the "twilight zone of jurisdiction" so that a harmonious rate structure and an adequate service could be secured for both state and interstate traffic.

Most of the state commissioners were also in complete accord with the Federal Commissioners. This question of co-operation was frequently discussed at the annual meetings of their national association. The discussion which first illustrates the thoughts of these conventions appears in the following resolutions adopted in 1917:⁴

"It appearing desirable in the public interest that legal authorization should exist for effecting co-operation between the Interstate Commerce Commission, and the commissions of the several States having jurisdiction over intrastate rates

² Annual Report of Interstate Commerce Commission, 1917. Pages 58-59

³ Annual Report of Interstate Commerce Commission, 1918. Page 3.

⁴ Annual Proceedings of the National Association of Railway and Utilities Commissioners, 1916. Page 41.

in cases where discrimination, interstate and intrastate rates might otherwise exist: and

"WHEREAS, Such co-operation can be secured only to a limited extent, and then only by voluntary action, for which no provision exists in the statutes; and

"WHEREAS, The Interstate Commerce Commission in its annual report for the year 1916, among its recommendations to Congress recommended as follows: That without abdication of any Federal authority finally to control questions affecting interstate and foreign commerce, the commission be authorized to co-operate with said commissions in efforts to reconcile upon a single record the conflicts of State and interstate rates: and

"WHEREAS, It is believed that legislation along these lines will go far to meet the requirements of any such rate situations: Be it

"*Resolved*, That the committee on State and Federal legislation be, and it is hereby directed to confer and co-operate with members of the Interstate Commerce Commission in bringing said matter before the Federal Congress with the view of securing the necessary statutory authority for effecting co-operation between the Interstate Commerce Commission and the regulatory commissions of the several states. Be it further

"*Resolved*, That it shall be the duty of said committee to inform the members of this association from time to time of any such legislation proposed for enactment by the Federal Congress, and that such notification shall be full and timely, and that all the members of the association shall have full opportunity to appear and be heard on all such proposed legislation, and to take such action in regard thereto as they may deem best for the public interest."

Chairman B. H. Meyer of the Interstate Commerce Commission addressed this Association in 1916.⁵ In speaking on this subject he declared that it was one of the progressive steps in the matter of railroad regulation. He believed that all future cases involving the principle of the Shreveport cases should be handled under a system of joint action. In order that this

⁵ Annual Proceedings of the National Association of Railway and Utilities Commissioners, 1916.

system could be most productive and most effective, he believed that Congress should pass such legislation as to give these joint hearings legality. He outlined a plan by which the state commissions involved in the discussion would not only attend the hearings but would also participate in the deliberations and assist in the formulation of the final conclusions upon a jointly made record. Co-operation in this way would be bound to lead to a harmonious adjustment of state and interstate rates. In some cases it would be possible for the state representatives to act in a quasi-judicial capacity—with an authority not below that of an Interstate Commerce Commission examiner, but this right would be granted only with the permission of the Federal agency. Mr. Meyer repeated these remarks before the National Association the following year, declaring that he believed that the plan was as practicable as ever. His recommendation in 1916 was important because it was the first time that the Interstate Commerce Commission had announced publicly its desire for legislation giving it the legal right to co-operate with state commissions. The state commissioners, however, did not react favorably to the proposal at this time and it was not discussed at this convention.

Nothing was done by Congress until the Transportation Act of 1920. Undoubtedly the continued recommendations of the Interstate Commerce Commission and the pressure exerted by the state commissions caused this legislative body to act. The co-operative provision is incorporated in Section thirteen, paragraph three, which provides for active co-operation between the regulatory agencies. This paragraph contains two separate provisions with respect to this topic. In the first place it authorizes joint conferences and joint hearings in those cases where the rate-making authority of a state is or may be affected and secondly, it authorizes the Federal Commission to avail itself of the co-operation, services, records, and facilities of state authorities. The first provision applies to all complaints which allege that intrastate rates are of a discriminatory character and it contemplates attempts to reach common understandings as to Federal and State rate structures, so that if there is unjust discrimination it may be removed by harmonious action without

the need for appeal to the courts. This is the provision that both State and Federal Commissions desire according to their repeated resolutions and recommendations. The second provision of this paragraph involves the use by the Federal Commission of the services and facilities of state authorities in the exercise of its Federal functions. The latter provision in no way gives legal status to any joint hearings of state and Federal regulatory agencies. It simply gives the Interstate Commerce Commission the right to request the state authorities to act as its agents. Questions of state authority are not necessarily involved.

This paragraph of the Act of 1920 does not require the Federal Commission to comply with either phase of the co-operative provision because Congress believed that it should not be compulsory for the Commission to institute co-operative proceedings. This opinion was made legally certain by the decision of the Supreme Court in the Wisconsin case. Congress desired to include in the Act of 1920 a provision which would permit every reasonable effort to be made to harmonize the conflicting views and opinions of the Federal and State commissions. The bringing together of these diverse opinions was to be brought about only through a careful investigation and discussion of the problem in which both parties were participants, so that both sides of the question might be advanced, thus bringing about a mutually acceptable understanding. Congress foresaw the necessity of reserving to the Federal Commission the right finally to decide the problem in the event it was impossible to arrive at a common understanding.

It was to be expected that the Interstate Commerce Commission would welcome this particular section in view of the preceding remarks. It apparently did not, however. No invitations were extended to the State authorities to co-operate on mutual problems with the exception of certain minor instances concerning the issuance of certificates of public convenience and necessity in cases of abandonment and construction and the advantages of the continued joint use of terminal facilities in the State of California. In two instances, the Federal Commission, at the request of the State Commission, had appointed examiners

to sit with the local commissioners in state rate proceedings. The most important co-operative action occurred in the proceeding known as *Ex Parte 74*,⁶ but very few state commissions were satisfied because of the broadness of the nature of this inquiry and their limited representation. These two facts made it impossible to consider local rates such as were involved in the State cases instituted before the Federal Commission as a result of the decision of *Ex Parte 74*. The State Commissions also complained that the above mentioned matters in which co-operation took place were relatively unimportant in comparison with matters of rates and service.

In an attempt to remedy this situation, the State Commissioners, during their annual convention held in the fall of 1921, appointed a special committee on co-operation between Federal and State Commissions.⁷ This committee was to meet with the chairman of the Interstate Commerce Commission, advising him of the wishes of the National Association of Railway and Utilities Commissioners. In addition, the committee was authorized to represent the Association at a conference to be arranged by it with the Federal Commission and that the results, together with its recommendations were to be reported to the National Association at its next annual meeting. No final conclusion could be reached by this committee, as this permission was not granted by the National Convention.

This conference was held during the early part of 1921. The committee declared, at this conference, that it was uncertain as to the classes of cases which the Interstate Commerce Commission considered subjects for co-operative effort and that it did not know how this co-operative effort should be initiated and worked out in practice. It also declared that it was ignorant of the Commission's plans and as a result asked for the Commission's attitude on the subject. The Federal Commission's committee replied in general terms the substance of which made clear that it had not prepared a plan which it desired to make

⁶ Modification of Transportation Act of 1920—Hearings before Committee on Interstate Commerce—United States Senate. Pages 57-58.

⁷ Annual Proceedings of National Association of Railway and Utilities Commissioners, 1921.

public. It suggested that the State Commission's representatives put their suggestions in writing so that the Federal Commission could consider them at a later time. Chairman Clark representing the Federal agency at this time did declare that he did not believe it to be in the public interest to declare in advance the "classes of cases" which would be declared proper subjects for co-operative effort.

In accordance with this suggestion the State Commissioners declared that they wanted complete co-operation with regard to two matters—rate cases and car service. With respect to the first proposition they wanted the Federal Commission to advise the State commissions having jurisdiction whenever any petition was filed with it which involved any intrastate rate, fare, charge, classification, regulation or practice, before it had taken any action on the petition in the form of an investigation or hearing. This notification should include an invitation to an informal conference or at least the Federal Commission should request the opinion of State Commissions involved as to the best method of solving the difficulty. In the event that no solution could be reached by this method, it should be the usual rule that the formal hearing should be conducted jointly. The State authorities also believed that the Federal Commission should express a desire to attend joint conferences and joint hearings in proceedings involving the relationship between state and interstate rate structures pending before State Commissions.

The Federal Commission replied to this written communication about five months later in which it expressed in very general terms, its desire to co-operate with the State Commission. It did not decline the proposals of the committee representing the State Commissions, nor did it accept them. It did state specifically that there were two classes of cases which were not considered appropriate for co-operative effort. First, those cases which have arisen because of a conflict between state and interstate rates when the latter are the result of a state statute which the State Commission is not able to change, and second, because the disparity in rate structures is due to either the affirmative or negative action of the State Commission, as a result of which the particular State Commission is appearing before the Inter-

state Commerce Commission as one of the parties to the conflict.

The Committee representing the State Commissions was quite upset over this apparent refusal of the Federal Commission to co-operate. It declared in a letter to the latter commission that the two classes of cases declared by it as not being fit for co-operative effort covered practically the entire field of causes bringing about the conflict between the two types of regulatory commissions. It stated that the Federal Commission's attitude prevented the carrying out of the co-operative provision incorporated by Congress in the Transportation Act of 1920 which was based upon the theory that a "frank and full discussion and comparison of information and views would in a given case be likely to lead to common conclusions, either as to the non-existence of discrimination or as to the method by which it should be removed." It then withdrew its offer inviting the Interstate Commerce Commission to sit with State Commissions in joint conferences and joint hearings on proceedings involving the relationship between State and Federal rate structures and practices in those cases which later may be heard before the commission.

The Committee in its report to the annual convention of the National Association of Railway and Utilities Commissioners in 1922, declared:—

1. That the Interstate Commerce Commission was inclined to be friendly with the State Commissions and therefore did not express itself one way or the other on the matter of co-operation.

2. That the majority of the Federal Commission believes that it has the power to control completely, intrastate rates not only as to particular intrastate rates which discriminate unjustly against particular interstate rates but also as to the reasonableness of the intrastate rates based solely on the revenue which they contribute to the whole. This opinion, it asserted, caused the majority of members to believe that it was both unnecessary and unwise to co-operate with regulatory bodies which have no power over a particular subject.

3. That the fundamental reason for its failure to secure a plan of co-operation from the Interstate Commerce Commission

was due to a lack of a legal interpretation of the extent of its power over intrastate rates under the Act of 1920.

This committee seems to have analyzed correctly the reasons for the reluctance of the Interstate Commerce Commission to co-operate. The United States Supreme Court gave its decision in the *Wisconsin Rate Case*⁸ on February 27, 1922. In this case it upheld the contentions of the Federal Commission with regard to the co-operative provision in full, in addition to its assumed power over intrastate rates resulting from the *Ex Parte* 74 cases. Just one week later, March 7, 1922, the Chairman of the Interstate Commerce Commission addressed a letter to the President of the National Association of Railway and Utilities Commissioners in which he referred to the *Wisconsin* case and concluded by inviting the President to select a committee representing his Association which would meet with a Committee representing the Federal Commission to discuss a plan of co-operation.⁹

During the hearings held before the Committee on Interstate Commerce on the Transportation Act of 1920, Mr. Edgar A. Clark, a member of the Federal Commission during this particular period, declared with respect to this point that:

"What the State Commissions requested the Interstate Commerce Commission to do at that time while this law was new, had not been subjected to any experiences, was to lay down a formula which should govern co-operation between the State Commissions and the Interstate Commerce Commission, to lay down the scope of the extent to which the Commission would turn over to the State Commissions jurisdiction of the question of exercising the emergency powers given to the commission with regard to physical operations. . . .

"The Interstate Commerce Commission has expressed itself in favor of preserving the activities of the State Commissions. But the Commission was unwilling in the absence of experience, with no precedents to guide it in regard to this question of co-

⁸ *Railroad Commission of Wisconsin vs. Chicago, Burlington and Quincy Railroad Company* (257 U. S., 371).

⁹ *Annual Proceedings National Association of Railway and Utilities Commissioners, 1924.* Page 40.

operation, to attempt to bind itself in advance to any set of regulations which would be sent to all the State Commissions, to be sent to the public everywhere, and until changed by the Commission would be binding upon it. It did not know what circumstances and conditions might arise where this co-operation would be most desirable and helpful—or undesirable. It was unwilling to abrogate . . . any of the powers which Congress had seen fit, after so careful an analysis of this new law, to vest in the Commission. It was desirous of co-operation whenever it could be done properly.”¹⁰

The invitation extended to the State Commissions' National Association through its President was accepted immediately. Five members of the Interstate Commerce Commission met with eight representatives of the State Commissioners at Washington, D. C. This conference drew up a tentative plan of co-operation based upon joint conferences and hearings. It was recognized by all that this plan was only temporary and that considerable changes in detail would be found necessary from time to time. At the same time, the plan's basic principles were considered to embody a sound working basis for the harmonious adjustment of State and Federal conflicts in the regulation of intrastate and interstate railroad affairs.

¹⁰ Modification of Transportation Act of 1920—Hearings before Commission on Interstate Commerce—United States Senate. Page 439.

VIII

THE CO-OPERATIVE PLAN AND ITS SUCCESS

The co-operative agreement drawn up at the conference between the Committee representing the Interstate Commerce Commission and the National Association of Railway and Utilities Commissioners was based fundamentally upon joint conferences and joint hearings. Since both the State Commissions and the Federal Commission were created for like purposes—that of creating a transportation system able to serve the public efficiently and economically—it was deemed necessary that in order to accomplish this end it was desirable for both sorts of commissions to work together.

The joint committee realized that it was necessary for each side to appreciate the significance of the nature and difficulties of the common problem in order that this plan of co-operation might succeed.¹ The State Commissioners on their part declared that it was essential to build up a national transportation system which should not be split up into parts by State lines. The Federal Commission, for its part, declared that State Commissions were necessary to the creation of an efficient, economical transportation system because of the vastness of the field of regulation. The extent of this field of regulation demanded that the Federal regulatory agency become acquainted with local problems and local needs in order that the danger of over-centralization of authority be obviated. It was in this field that the State Commissions could be used to advantage for these commissions are usually far better informed on local matters than is the Federal Commission. With such an attitude on the part of both Committees, the public may be more certain of a higher type of railroad regulation, for the best advice and reasoning is more apt to be brought out in each discussion.

¹ Co-operative plans adopted May 1922 and October 11, 1925. See Annual Reports of Interstate Commerce Commission for years 1922 and 1925.

The plan evolved in 1922 dealt largely with the question of intrastate rates which discriminate unjustly against interstate commerce or of interstate rates which are considered to affect intrastate commerce adversely. Applications for certificates of public convenience, involving the abandonment of old lines or the construction of new lines, conferences dealing with car service rules and regulations did not seem to be as important to the State Commissions as was the question of rates. In 1924, almost two years later, the Commission in conjunction with the members of the state commissions adopted a new plan. This plan did not differ materially from the old plan for it included the provisions of the old plan. It simply extended the principle of co-operation, emphasizing the fact that a harmonious agreement may be attained only by a frank co-operative discussion from the beginning of each complaint or petition and by a comparison of opinions leading to genuine attempt to reach a common understanding or solution.

The earlier plan contemplated joint action of both types of commissions with regard to four classes of rate cases. First, in those cases where the complaint that intrastate rate cases discriminate unjustly against interstate commerce is filed with the Federal Commission. Second, where the petition attacks interstate rates and the decision of the Interstate Commerce Commission seems likely to affect substantially the relationship between the State and interstate rate structures. Third, when a complaint is filed with a State Commission and the decision of this agency is likely to affect substantially the interstate rate structure. Fourth, where a rate structure of two or more states, or in a group of states may be affected by the proceedings of a complaint or investigation. These four classes of rate cases cover almost every practical situation where a conflict of regulatory authority is likely to occur. The new plan recognized this fact and incorporated these classes of co-operative rate cases without change. In addition there was included a general provision to the effect that it should "be considered appropriate and desirable for either the Federal or State Commissions to suggest a conference to the other on any matter or proceeding where the one commission may be of the opinion that matters

of mutual concern are involved and where co-operation may be had to advantage."

The procedure recommended by the old plan in bringing about co-operative action was not changed materially by the new plan. The former plan specifically laid down three steps at which the co-operative action might occur while the latter plan laid down four steps. In the first place, the commission to which the complaint is sent, was to notify the defendant or interested commission of the nature of the petition. In the event the latter agency desired a conference on this complaint, it was to notify the former agency to this effect. Upon the completion of these preliminary matters, the two commissions were to arrange a conference without delay. The new plan differed from the old plan at this step in the co-operative proceedings in that it seemed to emphasize the need for immediate action on the part of commissions in arranging this preliminary conference. This emphasis is highly commendable.

The second step in the co-operative procedure occurs when the case goes to hearing. The plan calls for a joint hearing of the case by both types of commissions, provided a proceeding is pending before the State Commission in which action can be taken upon a common record. This joint hearing may be the first step in the procedure as the plan declares that joint hearings will be appropriate when similar issues are pending before the Interstate Commerce Commission and a State Commission, or informal conferences pending the decision of cases where there has been no participation in the prior hearings. Two qualifications were placed on the joint hearing. First that these hearings involving interstate rates were to be governed by the rules of procedure as determined by the Federal Commission for its usual hearings in so far as it was practicable. Second, that the State commissions would not expect to participate in a judicial capacity with the members of the Interstate Commerce Commission or its examiners in any case where they appear as advocates. The State Commission or commissions have been invited usually by the Federal Commission to sit on the bench with its examiner or examiners in joint hearings. In cases involving several State Commissions it is obvious that it is

necessary for each commission to select a representative who would act for the State Commission as a whole.

These joint hearings are to be followed by informal conferences. It is at this point that the co-operative plan brings out the best results, for the purpose of the informal conference is to bring about an exchange of views between the two types of regulatory commissions. The personal contacts brought about by this meeting are bound to have a powerful influence in helping these men appreciate each other's point of view, to understand each other's position on matters which formerly were decided independently of each other. It is at these conferences that the statement of principles incorporated in both the old and new plan may be best realized, for it is only when two persons come together that it is easiest to realize the nature and difficulties of a common problem. These principles emphasize the fact that successful co-operation is "of the spirit and not a matter of rules and regulations." In short, real co-operation between the Interstate Commerce Commission and the State commissions is attained at this point in the rules of procedure which have been drawn up. Since these conferences are of an informal nature, the members are able to express themselves to their best advantage.

The new plan differs from the earlier plan in that it stresses the holding of the conferences whenever possible. This emphasis naturally improves the new plan for it is at the conference that the co-operative spirit most manifests itself. In addition to the oral informal conference it provides for a system whereby the State Commission or its representatives may give the Interstate Commerce Commission examiner their views in writing before the proposed report of the examiner is served. The elimination of the oral conference is often advisable in difficult and complex cases that necessitate careful thought and preparation on the part of all parties concerned. The Federal Commission makes its position clear as to the part which the State Commissions are to play in the proposed report, for the plan states that the proposed report shall embody the independent views of the examiners. This does not prohibit the State's representatives from indicating their views in writing to the Interstate Commerce Commission.

The fourth step in the present co-operative procedure occurs when the case comes to argument before the Interstate Commerce Commission. The new plan includes the memorandum adopted by the Commission, November, 1924, in which the co-operating State commission or commissions are expected to sit with the Federal Commission at the argument if they so desire. The old plan makes no mention of the possibility of co-operation at this point. The Interstate Commerce Commission, however, had usually supplemented the formal notice of the date set for the argument with an express invitation to the co-operating parties to sit at the argument. This invitation was overlooked occasionally with the result that the State Commissions were uncertain as to their position when the case came to argument. The new plan states that no special invitation is to be sent the co-operating parties but that the mimeographed notice sent from the Bureau of Dockets is to be considered as taking its place. The only request that the Federal Commission makes of a State is that its Secretary be notified of the number of persons who are to be present, so that proper seating arrangements may be made.

At the conclusion of the argument, conferences between the co-operative parties are to be held if such a procedure is considered desirable by the State authorities. The purpose of the conference at this point is to consider plans for finally disposing of the complaint or investigation. The benefits of these conferences are of just as much value—perhaps of more value than those held at the conclusion of the joint hearing. Joint hearings and attendance at the argument are not of much value by themselves, for no opportunity is afforded the co-operating parties to present their views in such a way as to attain a mutually complete understanding of the problems involved. The joint discussion at each informal conference contributes to that complete understanding which the parties to the co-operative plan sought to attain.

The Interstate Commerce Commission is to be congratulated upon its attitude in this co-operative scheme. It realizes that co-operation is not a matter of rules and regulations which are so formal and so binding as to become formidable. The rules

regarding the procedure to be followed in co-operative cases are remarkable because of their simplicity and brevity. They are such as to make for mutual confidence. Throughout the entire articles of agreement one finds such statements as these: "The utmost promptitude compatible with circumstances is urged, in order that co-operative action between the Federal and State Commissions may not be productive of delay in disposing of important matters and cases." "The aim is to establish the understanding that co-operative action involves always opportunity to sit at the argument and in subsequent conferences." "Co-operation . . . must in the nature of things be of the spirit and not a matter of rules and regulations." "Our common purpose is to give the utmost force and effect to this provision of the law." It is no wonder that, as a result of such expressions, Commissioner Meyers—the first to really urge a plan of co-operation—has been able to say that "co-operation at the present time is real and worthwhile."

The 1925 Annual Report of the Interstate Commerce Commission states that 41 State commissions have co-operated with it in rate cases in which intrastate-interstate rate relationships were involved to some degree. Since many of these State commissions have co-operated with the Federal Commission in more than one instance, it is apparent that the number of co-operative cases is large. Many cases may be cited to illustrate the benefits of co-operation to both commissions.

One of the most interesting of these is the so-called Oklahoma Grain Rate Case.² The Oklahoma commission made a complaint to both the Texas Railroad Commission and to the Interstate Commerce Commission in which it declared that the interstate rates on grain from all points in Oklahoma to all points in Texas were unreasonably high and also that the Texas intrastate rates were unjustly discriminatory against the prevailing interstate rates. The presentation of the complaint to both Commissions paved the way for co-operative action on the part of both the Texas Commission and the Federal Commission, since it would

² Oklahoma Grain Rate Case, Interstate Commerce Commission Docket 12244. 69 I. C. C., 207 and 101 I. C. C., 116. National Association of Railway and Utilities Commissioners 1924. Pages 47 and 304.

permit the equalization of rates which could be made upon a common record. The interesting feature of this case is that the Oklahoma Commission argued the case before a joint tribunal composed of members of the Texas Commission and the Federal Commission. This tribunal decided that the petition of the Oklahoma Commission was justifiable. But the correction was not brought about by an order of the Interstate Commerce Commission, for the decision of the joint tribunal ordered the Railroad Commission of Texas to take "such action as was necessary to remove the prejudice and preference herein found to exist by reason of the present intrastate rates in Texas." Furthermore, the changed Texas Commission's schedule of intrastate rates was to be applied in interstate commerce between Texas points and Shreveport, Louisiana.

In this case, the Texas Commission not only sat with the Interstate Commerce Commission examiners in a judicial capacity on a complaint attacking the intrastate rates which it had established by its own action, but it was allowed to establish a new schedule of intrastate rates which would remove the unjust discrimination against interstate commerce and also to establish interstate rates between Shreveport, Louisiana, and all Texas points. This remarkable situation shows the value of the co-operative plan to a marked degree. It paved the way for the amicable settlement of a dispute which prior to its adoption would most certainly have taken a long time to correct. The correction under these conditions would have been followed by the usual strained relationships among all parties concerned.

It may seem strange that the Interstate Commerce Commission should have allowed the Texas authorities to remove the discrimination prevailing in interstate commerce. This policy is sound, however, because it is fundamental not only to the dual system of Federal and State regulation but also fundamental to the co-operative plan. Had the Federal Commission issued the order correcting the situation between Texas points and Shreveport, Louisiana, these rates would have become "frozen" *i. e.*, the State Commission would not be allowed to regulate them and the Federal Commission would not have any power

over them except as to unjust discrimination.³ This is the result of the provisions of the Act of 1887 as amended to date, which states that the orders of the Interstate Commerce Commission are to remain in effect "until further order of the Commission" and that under the provisions of Section thirteen, paragraph 4, the carriers are required to observe this order regardless of any State legislation or decision by a State administrative agency, until such time as the Federal Commission may see fit to order otherwise. Such a situation is not desirable in the public interest as it makes the rates structure too inflexible.

Without a system of co-operation, the "frozen rate" situation could not be remedied easily. The states could issue no orders raising the intrastate rates to the interstate level because they had no authority over the rates put into effect by the Interstate Commerce Commission. The Federal Commission, on the other hand, would refuse to issue a vacating order, until it was certain that the previous unjust discrimination would be removed by the State Commission's order. The co-operative agreement is the machinery which brings the two commissions together to discuss the problem. This conference would result in an agreement, acceptable to both, with the result that the Federal Agency could issue a vacating order knowing that the State Commission would investigate promptly and issue an order which would be in accord with the Commission's desires. Co-operation of this sort, if successful in every case, would do away with the impossible and unfortunate situation resulting from the Interstate Commerce Commission's *Ex Parte* 74 decisions, when so many states temporarily lost their power to regulate their intrastate rates either in whole or in part.

The benefits of co-operative action have been also of great importance during the recent investigations of the Interstate Commerce Commission concerning express rates,⁴ Southern territory class rates,⁵ and the present Trunk Line Territory rate

³ *Frozen Rate Situation—Modification Transportation Act—Senate Hearing*, 1922. Pages 177, 181, 529, 577, 688–690.

⁴ *Express Rate Case*, 1923. 83 I. C. C., 606 and 89 I. C. C., 297. *National Association of Railway and Utilities Commissioners*, 1924. Pages 138–139.

⁵ *Southern Territory Class Rate Investigation—Docket 13494*.

structures.⁶ These cases involved either the entire country or a large section of the United States.

It is interesting to note that no serious conflict between the States and the Federal authorities resulted from the latter's nationwide order revising the express rates. Co-operation in this instance, was the result of a suggestion made by Mr. John E. Benton, General Solicitor for the National Association of Railway and Utilities Commissioners to Commissioner McChord of the Federal Commission. The difficulty bringing about this co-operative case was the direct result of the refusal of the Intermountain States, South Dakota, Arkansas and Georgia to increase their intrastate express rates to the interstate level as directed by the Interstate Commerce Commission upon the ground that they were unjust and unreasonable. California and Illinois had increased their express rates in part only. The American Railway Express Company then made a complaint to the Federal Commission that unjust discrimination existed in each of these states. Hearings upon these complaints were held but no decision was made by the Commission. Instead, it issued an order requiring a general investigation of interstate express rates throughout the United States. It was at this point that Mr. Benton suggested co-operation to Mr. McChord, who heartily welcomed and accepted the suggestion.

Commissioner McChord came to the Annual Convention of the State Commissioners held in Detroit and asked the convention to appoint a committee of five from among their members—one from each of the five express rate zones. This committee was to select an Examiner of one of the State Commissions who was to sit with the Examiners of the Interstate Commerce Commission in the general investigation of the express rates. Hearings were held at Washington, Atlanta, Dallas, Phoenix, San Francisco, Tacoma, Helena, Denver, Omaha and Chicago. Many conferences followed these hearings between the committee representing the State Commissioners and the

⁶ Trunk Line Territory Investigation, Docket No. 17000. Report Committee on Co-operation with Interstate Commerce Commission, October 1925, to 37th Annual Convention—National Association of Railroad and Utilities Commissioners.

Interstate Commerce Commissioners and the Examiners hearing the case. These conferences led to the tentative report. During the final arguments and in the conferences leading to the final report, much co-operation was in evidence. The result of this general investigation was a large reduction in the Intermountain region and a smaller reduction on the Pacific coast and in the old second zone and third zones. (The country had been divided into five zones prior to this decision—at present it is divided into three.)

This case illustrates the benefits resulting from co-operation between two parties who are willing to meet each other on a common ground. In the first place, this case shows that the State Commissions were correct in refusing to grant the increases previously ordered into effect by the Federal Commission. Secondly that the Federal Commission upon being advised of the facts realized that an unjust situation would have existed in certain states had their previous order not been contested by these State Commissions. Thirdly, that the matter of express rates was settled almost simultaneously and that co-operation did away with the possibility of a Supreme Court decision. One can only marvel at the effectiveness of co-operation in this instance.

The success attained by co-operation in this case is in marked contrast with that which existed at the conclusion of the *Ex Parte 74* decision of the Federal Commission in 1920.⁷ In this case the Commission asked the State Commissioners to elect a committee of three from among its members to act as its representatives. The individual State Commissions were not asked to co-operate on matters involving rates under their respective jurisdiction. It is not surprising, therefore, that the Interstate Commerce Commission was compelled to issue orders in twenty-eight different cases involving almost as many states.

The co-operative organization created for the Southern Class Rate investigation had as its aim a very close contact with the State Commissions. These State Commissions were asked

⁷ *Ex Parte 74. Increased Rates. 58 I. C. C., 220.*

to elect a committee of five from among their members, which was to sit in the hearings and in the final argument with the members of the Interstate Commerce Commission. The Committee was to feel free to question all witnesses on the same basis as did the members of the Commission. It was to participate in all the conferences at the conclusion of the joint hearings and the final argument. It was emphasized that the several Southern Territory State Commissions were to be given an opportunity to present their problems and opinions before this joint tribunal whenever they wished to do so.

Co-operation in this case was considered necessary and desirable, even though no investigation was to be made into the intrastate rates or classifications, because the Commission stated that one of the results it hoped to accomplish was to bring about a greater degree of harmony between interstate and intrastate rates within Southern territory. The investigation was to afford the Federal Commission sufficient information so that it could "establish such interstate class rates which may serve as a reasonable guide to the State Commissions in the adjustment of intrastate class rates."

No direct evidence may be presented as to the success of this co-operative action. However, it is very likely that it will be beneficial to all concerned. The Federal Commission has declared "the co-operation of the Southern State Commissions has been of notable aid in the conduct of the inquiry." The Alabama Public Service Commission deferred its inquiry into its intrastate rates which it had begun in 1921 until the results of the investigation could be determined. These two facts tend to show that some degree of success has been attained.

Since the publication of the Commission's report only two states have objected. The State of North Carolina does not believe that the proposed rates from the Ohio River crossings and central territory to North Carolina are reasonable. Moreover, it believes that the proposed intraterritorial rates "other than those from the Ohio River cities are too high and that it will be more satisfactory to all interests to preserve the general system of grouping rather than to adopt a complete system of mileage scale rates." The Railroad Commission of Florida

objects to the higher schedule of rates to be applied within the whole peninsula of Florida inasmuch as it does not believe that transportation conditions within that state are so dissimilar from those prevailing throughout the southeast.

The co-operative organization suggested by the Interstate Commerce Commission for the Trunk Line Territory investigation was still further improved. The States interested in this proceeding were asked to appoint a committee of nine State Commissioners. A sub-committee of three was to be chosen out of this group in order that convenient and continuous contact between the Federal Commission and the major State committee might be facilitated. The members of this sub-committee were expected to give a great deal of time and study to the subject matter investigated. In addition to these committees, the State Commissions were requested to appoint a committee of nine rate experts which would represent the State interests and which would assist the rate experts appointed to the investigation by the Interstate Commerce Commission. A sub-committee of three rate experts was to be selected from this group of nine men. Each State Commission was to be invited to discuss all matters that pertained to its territory as they were brought up. In this way, all affairs involving particular states would be handled in a co-operative way. The committee of State Commissioners was to sit on a basis of equality with the members of the Federal Commission at the hearings and at the final argument and were to participate in all the conferences held at the conclusion of these hearings and final argument.

The State Commissioners in this territory did not accept Commissioner Eastman's proposal. They felt that it would be difficult to secure a committee of commissioners fairly representative of all sections who could give sufficient time to the case. It was believed that better results would be obtained by offering the Interstate Commerce Commission individual State Commission aid.

The result of such aid has been beneficial. Evidence has been submitted on behalf of the State Commissions of West Virginia, Kentucky and Wisconsin. The commissions representing Maryland, West Virginia, Michigan and Wisconsin have sat

at certain hearings upon invitation. As a matter of comity, the rate expert of the New York State Public Service Commission has also sat with the Interstate Commerce Commission throughout most of the hearings. Similar representatives of the New Jersey and Pennsylvania Commissions have also sat with the Interstate Commerce Commission from time to time. None of these representatives were consulted with regard to the conduct of the hearing and it is not intended that they will participate in any conference with the Commission concerning the findings.

The Western Coal Rates co-operative case⁸ is an interesting example showing how the co-operative plan permits both commissions to modify each other's rulings so as to secure a harmonized rate structure for both interstate and intrastate commerce. It was alleged originally that the Wyoming intrastate coal rates unjustly discriminated against interstate coal shipments from Colorado. After an investigation, the Interstate Commerce Commission in March, 1924, issued an order requiring a certain intrastate rate to be not less than a certain interstate rate by a definite sum. At the time that this proceeding was instituted, the Wyoming Public Service Commission also had investigated the complaint, issuing an order which differed from that which had just been issued by the Federal Commission. The latter Commission suggested to the Wyoming Commission that it postpone its order until co-operative action could be had. The co-operative investigation resulted in both commissions issuing orders modifying their preceding orders with the result that the interstate and intrastate coal rate structures were harmonized without conflict. In addition, the Federal Commission declared that since "the rates which the Wyoming Commission has now prescribed more nearly conform to the level of interstate rates prescribed by us in the same territory, they may therefore be used for the purpose of fixing relationships with the interstate rates from the Colorado districts."

Several other cases will be cited below to show how the co-

⁸ Western Coal Rates. 80 I. C. C., 383. National Association Railway and Utilities Commissioners, 1924. Page 304.

operative plan secures the results pointed out in the above cases. These cases show that the State Commissions have not only been allowed a greater influence in the regulation of their intrastate railroad affairs, but they have had a decided influence in determining many interstate railroad rates. The Federal Commission has secured help and advice from many State Commissions with the result that its work has been more effective. The general public has secured the benefits accruing from this much more scientific method of rate regulation, the aim of which is to substitute all conflicts of regulation in railroad affairs by a system which aims to settle all disputes amicably and in the interest of all parties concerned.

The so-called Cement case affords another example of co-operation.⁹ In this case a joint tribunal comprising an Examiner of the Federal Commission and the Oklahoma State Commission conducted the hearing. A conference was held jointly on the Examiner's proposed report, and a member of the Oklahoma State Commission sat with the Interstate Commerce Commissioners at the final argument and in the conference following the argument leading to the decision. The result of such close co-operation was excellent for identical rates were prescribed for Oklahoma interstate and intrastate shipments. These rates have proved to be satisfactory to all parties concerned, since all questions of intrastate and interstate discriminations were removed by one stroke. The co-operative action in this case resulted at the instance of the State Commission.

Another interesting co-operative case—one dealing with a most important Western industry—regulated the minimum carload weights on hogs.¹⁰ The State of Iowa had before it a case whose decision was to regulate the minimum carload intrastate weight shipments. At the instance of Commissioner Lewis of the Interstate Commerce Commission, this case was made a part of an interstate investigation of minimum carload

⁹ Oklahoma Cement Rate Case. 80 I. C. C., 451. National Association of Railway and Utilities Commissioners, 1924. Page 46. Docket 590 (Oklahoma).

¹⁰ Minimum Carload Weights on Hogs in Missouri and other States. 81 I. C. C., 374. National Association Railway and Utilities Commissioners, 1924. Page 44.

weights on hogs. The joint tribunal comprised Commissioner Lewis, a Federal Commission Examiner and a committee representing the State Commissions of Missouri, Illinois, Minnesota, Nebraska, Wisconsin and South Dakota. These State Commissions selected three State Commissioners to act on their committee, one from Minnesota, one from Nebraska, and one from Oklahoma. This joint tribunal sat throughout the hearings and argument and attended all the conferences held at the conclusion of the hearings and argument. The result was very favorable, for the order of the Interstate Commerce Commission in prescribing interstate minimum weight was accepted by the State Commissions as to their intrastate traffic. This case is another illustration of the way in which co-operation has brought about a general readjustment of interstate and intrastate minimum weights without conflict.

Another co-operative case occurred between the Federal Commission and representatives of the States of Missouri, Kansas, Arkansas, Texas and Oklahoma, involving the interstate and intrastate rate structure on brick and clay products.¹¹ The Federal Commission had received complaints involving Kansas, Arkansas, Texas and Oklahoma intrastate rates and these were filed under Dockets 15467, 15628, 15693 and 15738. Much testimony was taken at the hearings held in Fort Worth, Texas, Oklahoma City, Kansas City and Hot Springs, Arkansas. The final result brought about a common scale of rates for both interstate and intrastate shipments of brick and clay products.

The co-operative proceedings on rates for iron and steel products between Central Freight Association territory and Trunk Line territory points provide another example of the success of this method of solving rate problems.¹² The Commission filed a schedule of tariffs revising the interstate rates on iron and steel articles between points in Pennsylvania, Ohio, West Virginia and New York. Similar schedules were filed with the State Commissions. After a joint hearing had been held, the Federal

¹¹ Brick and Clay Products, Docket Nos. 15467, 15628, 15693, 15738. National Association Railway and Utilities Commissioners, 1924. Page 47.

¹² C. F. A., Trunk Line and Steel, I. & S. No. 1929. National Association Railway and Utilities Commissioners, 1924. Page 33.

Commission issued its proposed report. This proposed report was discussed at the oral argument at which representatives from the above mentioned State Commissions were present. This procedure was followed by a proposed final report which was sent to the State Commissions for their consideration. These State Commissions submitted several points to the Federal Commission which it adopted for the most part, thus forming a basis for a mutual agreement by all the State Commissions with the exception of one, which agreed only in part.

Docket No. 1858 *I. and S. Cotton and Cotton Linters to Louisiana and Texas Gulf Ports* provides another illustration of the manner in which the State Commissions have succeeded in modifying the opinions of the Federal Commission.¹³ The latter commission had filed schedules revising rates on cotton and had sent these schedules to the Louisiana Public Service Commission. This commission attended both the joint hearing and oral argument and succeeded in having the Federal Commission modify its proposed final report in part. Both Commissions at the conclusion of this work adopted the rates.

Co-operative proceedings were held with the Michigan Public Utilities Commissioner in the case of the so-called *Increased Switching Charges at Detroit*.¹⁴ Co-operation occurred at both the hearing and the final argument. A report was prepared by the Federal Commission at the conclusion of the oral argument and sent to the Michigan Commission for their consideration. This action on the part of the Federal Commission led to a conference at which harmonious conclusions were reached. In this way, this matter was successfully solved and the increased switching charges at Detroit were put into effect for both intrastate and interstate commerce by the respective commissions.

A very interesting case was decided in December, 1925, relating to the transportation, both interstate and intrastate, of lumber, in which the State of California took an active part.¹⁵ In this

¹³ *Cotton and Cotton Linters to Louisiana and Gulf Ports*, I. & S., 1858.

¹⁴ *Increased Switching Charges at Detroit*, Michigan. 91 I. C. C., 82. National Association Railway and Utilities Commissioners, 1924. Page 43.

¹⁵ *Los Angeles Lumber Products Company v. Southern Pacific*, Docket No. 15303.

case the Federal Commission accepted the recommendations of the California Railroad Commission without change. Complaint had been made to both commissions seeking for an adjustment of rates either in intrastate commerce or in interstate commerce. The California Commission issued two orders (No. 14732 and No. 15594) in which it granted relief to the complainant in part. The Federal Commission accepted this Commission's investigation and decision and entered an order to that effect.

Co-operation has proved remarkably successful. It is not possible to find many instances in which it has failed. The difficulties encountered in the Southern Class Rate investigation are important. Some way must be found to remedy this unfortunate situation. On the whole, the co-operative plan and its application to practical problems has been satisfactory to the large majority of the Interstate Commerce Commissioners and to a large majority of State Commissions. Occasionally, there crops out an instance where one party or the other is not completely satisfied. For example, the Florida Commission in the Gulf Ports Terminal Company abandonment case refused to co-operate. It gave as its reason that it did not believe that co-operation in this class of cases was in the public interest.¹⁶

In the Southern Class rate investigation, Commissioner Maxwell, one of the members of the Committee of five State Commissioners sitting with the Interstate Commerce Commission, declined to continue in that capacity, stating¹⁷ that he found himself "so thoroughly out of sympathy with the proposals of the carriers for the readjustment of rates to the Carolina territory . . . that (he had) . . . decided that in justice to . . . the Interstate Commerce Commission, (he) should not undertake to carry out a pretense of judicial attitude even in an associate or advisory capacity." Commissioner Maxwell believed that he could best serve the interests of the people he represented by attacking the proposals from the floor and that he believed that his feelings did not allow him to be fair and impartial in deciding upon the fairness of the

¹⁶ Gulf Ports Terminal Company—Letter in Original Record.

¹⁷ Southern Class Rate Investigation. Docket No. 13494.

carrier's proposals regarding the Carolina territory. Mr. Maxwell's position is undoubtedly due to the fact that the State of North Carolina rate structure is very favorable in comparison to the rest of the South. Naturally the suggested changes produced a conflict of interests to which the state could not be reconciled.

A recent development has occurred which disturbs the satisfactory working out of the co-operative plan more seriously than the preceding illustrations. The Minnesota Railroad and Warehouse Commission has challenged the validity of the Federal Commission's orders in the Fargo and Watertown cases.¹⁸ It declares that the complaints in both cases were directed against the interstate rates on the grounds that they were unreasonably high. In the former case, the Fargo Chamber of Commerce declared that the Minnesota rates were "not unduly low, and that the discrimination against the interstate commerce between the Minnesota points of origin involved and Fargo, North Dakota, can *legally* be removed *only* by reducing the interstate rates herein attacked as unreasonable per se."

The Minnesota Commission also declares that it had not been asked to co-operate with the Interstate Commerce Commission in the Fargo case. Furthermore, it did not realize that its rates were to be increased as a result of this complaint, since its rates were not attacked. The State Commission applied for a rehearing in both these cases, but its petitions were denied by the Federal Commission, November 2, 1925.

The State authorities declare that the order of the Interstate Commerce Commission is too drastic—so much so in fact as to disturb seriously the "commercial and economic life of the people of the State of Minnesota," and that it "cannot accept any such conclusion until a court of competent jurisdiction has so decided."

A recent article in a leading transportation journal has appeared in which it seems that the State Commission has reversed its decision and has decided to file another petition

¹⁸ Order and Findings of the Minnesota Railroad Commission, December, 1925.

¹⁹ *Traffic World*, January 9, 1926.

for a rehearing of both cases with the Interstate Commerce Commission.¹⁹ This statement was not verified by its Secretary, Mr. Thomas Yapp. He declared that the carriers are to appear before the district court of Ramsey County, Minnesota, to answer a charge of having violated the Minnesota State Laws. He states, furthermore, that he is unable to forecast the outcome of this case.²⁰

These disturbing influences should not be allowed to disrupt the cordial relationship existing between the Federal and State Commissions. In the latter instance, it is to be hoped that the former commission had forgotten to notify the latter commission. At any rate, it is not too late to rectify this situation. They do show that the co-operative plan is to be unsuccessful in those instances where a particular state's interests are so strong that it cannot submit to a plan which will modify the advantages it desires to retain or which it desires to obtain. These instances are bound to crop out from time to time, but by no means should they be allowed to undermine the confidence of those who are working for the success of the plan.

Co-operation has succeeded in solving the question of intrastate rate jurisdiction in the great majority of instances. It is a real and worthwhile system whose application should be extended, for the results have fully justified its existence. It gives the parties actively interested in the case an opportunity to be present at the time it is being considered. It is in accord with the principle laid down by Mr. John Stuart Mill, a noted economist, that "in the absence of its natural defenders, the interest of the excluded is always in danger of being overlooked; and, when looked at, is seen in very different eyes from those of the persons whom it directly concerns."²¹

This principle is very important in view of the procedure followed by the Interstate Commerce Commission in determining most formal questions in dispute. The order of the Federal Commission is made upon the examiner's report. The Com-

²⁰ Letter from Mr. Thomas Yapp, Secretary of the Minnesota State Railroad Commission, March, 1926.

²¹ Mill, John Stuart, *Considerations on Representative Government*, Chapter III.

mission goes on the assumption that sufficient evidence existed to support the examiner's decision. Frequently the oral argument takes place at least several weeks before the final decision of the Interstate Commerce Commission, and in many instances several months before it has arrived at its final opinion. These facts mean that the State Commission has not been afforded adequate opportunity at the time most vital to a correct interpretation of the facts to present its case. Co-operation provides the machinery to correct this situation. It allows either commission to request mutual action. This sort of action allows each party to bring out the pertinent and vital points. It gives the State Commissions an opportunity to sit with the Federal Commission and thus more easily direct its attention to the reasons for its original decision or to the reasons for a change. The State Commissions no longer need to depend upon the Federal Commission's ability to recall a vital point presented by its attorney several months before the final decision is issued. They are present at the time when it is most necessary to protect their interests, for joint discussions will insure proper attention to matters vital to the correct interpretation of the facts.

CONCLUSION

The co-operation of Federal and State Commissions presents a solution to the serious problem that has developed in the past with respect to the regulation of intrastate rates. During the last two decades the growing extension of Federal authority has been reflected in railroad regulation with the result that the Interstate Commerce Commission has been given an almost complete control over intrastate railroad rates and services. This power is undoubtedly in the best interests of the public, for it would be impossible to build up a powerful and efficient railroad machine fully able to maintain its place in the economic development of our country, when its regulation is undertaken by forty-nine sovereign governments. Regulation to be effective must be both complete and uniform.

The decision in the Shreveport case clearly points to the path that railroad regulation should follow. Under our dual system of government regulation unjust discriminations between state and interstate commerce are certain to occur. Such discriminations should not and can not exist, and the settlement of these troublesome questions involves a consideration of traffic and business conditions, usually requiring a scientific adjustment of intrastate rates to interstate rates. The decision in the Wisconsin Passenger Fares Case extends this power so that the Federal Commission has control over intrastate rate levels and also the power to require State Commissions to raise a particular intrastate rate when this rate does not bear its fair share of the total income necessary to maintain an adequate national railroad system.

This sweeping grant of power is not to be understood as taking away from the states the right to use their own judgment in dealing with intrastate rates as between themselves, on the general level which the Interstate Commerce Commission has found to be fair for interstate commerce. The states, however, in making use of this right must always pay due regard to the revenue needs of the carriers as a whole, and also the revenue requirements for a particular service. Moreover, these rates must in no way discriminate unjustly against interstate commerce.

It is popularly believed that these three legal limitations on the power of a state to determine its intrastate rates are so broad as to render the latter's authority practically valueless. This is true only in so far as it relates to the power that the states have in directly determining the extent to which it may deviate from the level of rates that the Interstate Commerce Commission declares just and reasonable for intrastate commerce. Recent decisions of the Interstate Commerce Commission indicate that in conformity with the decision of the United States Supreme Court in the Wisconsin Passenger Fares Case, it has taken a position that its power to correct an intrastate rate established by a State Commission can be exercised only when this rate injuriously affects interstate commerce in violation of the Interstate Commerce Act. Discriminations between individual interstate and intrastate rates, or as between interstate and intrastate rate levels come within the provision of the Act to Regulate Commerce only when such discriminations injure interstate commerce to a *material extent*. It is only when intrastate rates affect interstate commerce to the detriment of the latter that the Federal Commission will issue orders correcting the situation.

These limitations are in strict accordance with what most transportation authorities believe in the best interests of all. They do not prevent a state from adjusting its intrastate rates so that each community within its boundaries will receive equitable and fair transportation service. On the other hand it provides for a central authority with power to bring together all the different state rules and regulations so that a more harmonious, unified system of railroad regulation may be secured.

Certain members of the Interstate Commerce Commission and certain members of the National Association of Railway and Utilities Commissioners were not satisfied with this legal ruling in the Wisconsin Case to determine finally the respective authority of the Federal and State Commissions. It was realized that frequent legal opinions would be necessary to measure definitely how materially an intrastate rate injuriously affected interstate commerce. These frequent clashes between the national and state commissions are undesirable and contrary

to the public interest. In order to prevent conflicts of authority and to harmonize the intrastate and interstate rate structures, Congress had previously enacted in the Transportation Act of 1920, the so-called co-operative provision giving legal sanction to co-operative action between the Interstate Commerce Commission and the several State Commissions. It also authorized the former administrative agency to draw up a plan under which joint action between these two bodies may take place.

The plan finally adopted by both the Interstate Commerce Commission and the National Association of Railway and Utilities Commissions establishes co-operative action in preliminary conferences, joint hearings and final arguments. Both co-operating parties are to sit together, thus forming a joint tribunal at the joint hearing and final argument. In addition to this sort of co-operative action, informal joint conferences are to be arranged at the conclusion of these hearings and final arguments. The conferences allow each party to bring forward the pertinent points involved in the proper solution of the problem and therefore may be said to constitute the really important part of the co-operative plan. This is true, because little opportunity is possible at the hearings and final arguments to exchange views.

The Interstate Commerce Commission in formulating this plan hoped to eliminate conflicts due to the growing interrelations of federal and state regulation of commerce. Interstate and state commerce are so closely interwoven that it is usually impossible to segregate the two classes of traffic. State boundary lines are not drawn with reference to economic needs and any difference between the provisions of regulating Acts and orders of the federal and state authorities tends to raise questions as to jurisdiction. These conflicts of authority frequently delay or prevent enforcement of regulations necessary to the best interests of the public.

This plan is also in accordance with our dual system of regulation. Local opinion requires state commissions to regulate local railroad affairs. It is firmly believed by many people of importance in local affairs that the interests of each particular locality can be advanced best when a local administrative

agency exists to investigate and determine matters of purely local interest. This opinion is sound in so far as the orders of the local agency do not disturb the interests of communities outside its jurisdiction.

It is unfortunate, however, that the several states, in their desire to further their own interests, should pass statutes disturbing the relationships between each other. Frequently these statutes are enacted without contemplating the direct or indirect effects upon outside communities. In order to guard against any material injurious effects upon interstate commerce, a central agency is required, such as the Interstate Commerce Commission, endowed with sufficient powers to regulate the relationships between the several states.

The Interstate Commerce Commission as the central regulatory authority ought not to ignore the opinions of the state railroad regulatory officials. The opinions of these local authorities are frequently in the public interest, but aside from this reason, it is excellent diplomacy upon the part of the Interstate Commerce Commission to consider local opinions, for it is in response to local opinion that representatives in Congress eventually give the Federal Commission its powers.

The dual system of regulation is inevitable. However, certain harmful results are natural, especially because of the interrelation of federal regulation of interstate commerce and state regulation of intrastate commerce. The co-operative plan, by co-ordinating the efforts of the National and State commissions, will secure decisions leading to a harmonious adjustment of state and interstate rates, where adjustment is necessary and can be made.

Co-operation between the Federal and state commissions in the regulation of railroads is still in the experimental stage. Considerable progress has been made during the few years in which the plan has been in operation. The disposition of the Federal Commission and the State commissions to co-operate is such as to make certain the success of the plan. The rules and regulations governing the procedure used in co-operative cases are the product of men of broad vision.

One weakness is apparent. No central agency has been

created, the duties of which are centered on the development of co-operation between the Federal and State commissions. It would be advisable to create an office within the organization of the Interstate Commerce Commission to maintain close contact with all cases in which co-operation is advisable. This office would notify the Federal and State commissions of these cases and would arrange for the joint consideration of problems at the several conferences, the hearings and the final argument by invitation. Such a system would evince a personal desire on the part of the Interstate Commerce Commission to co-operate and would be better than the present impersonal method of establishing and maintaining co-operative relationships. It is hoped that the Commission may feel such an office is desirable as soon as the plan has passed through the experimental period.

There is little reason to fear that many embarrassing conflicts in regulatory authority will arise in the future. The numerous examples of the success of co-operative action prove that co-operation between men who are willing to work together for the proper solution of a common problem is bound to succeed. No material change need be made in the powers of the Federal Commission nor should any additional material power be granted to the State commissions. The powers of each commission as now interpreted by the United States Supreme Court are such as to make for a harmonious rate structure throughout the country. At the same time, each locality is assured adequate representation. The Act of 1920, by increasing the power of the Interstate Commerce Commission and by including the co-operative provision, has solved the problem of securing harmonious railroad rate regulation. It promotes a broader view on the part of the local regulatory authorities and a more intimate acquaintance with local conditions and circumstances on the part of the Federal authorities. This will be reflected in decisions that embody the best judgment of the Interstate Commerce Commission and of the State commissions.

¹ Ohio Sand and Gravel Case—85 I. C. C., 66.

Hunter Brothers Mercantile Company et al v. American Railway Express Company. Docket No. 15079

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